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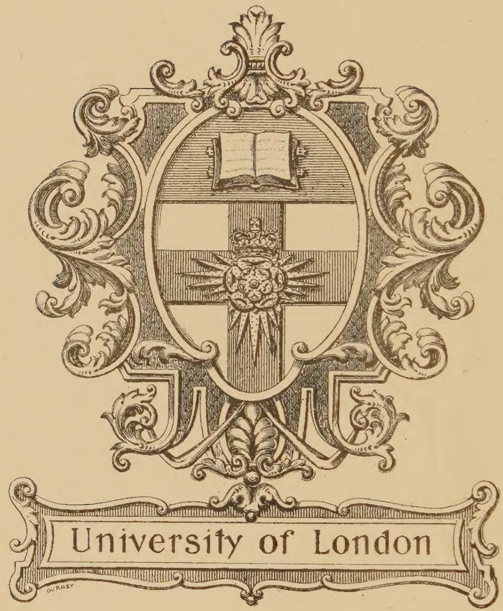

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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

SHIRVELL *v.* HACKWOOD ESTATES CO., LTD.

[Court of Appeal (Greer and MacKinnon, L.JJ., and Bennett, J.), **January 26, 27, March 7, 1938.**]

Landlord and Tenant—Tree on landlord's ground with dead branch overhanging tenant's land—Death of workman employed by tenant caused by fall of branch—Whether landlord liable apart from negligence—Negligence—Advice of forestry expert as to best method of dealing with dead trees.

The plaintiff had leased a farm from the defendants, who also owned adjacent land. On this adjacent land there was a partly dead beech tree, a dead branch of which overhung the land leased by the plaintiff. A workman employed by the plaintiff was killed by the falling of this dead branch. His widow obtained an award against the plaintiff under the Workmen's Compensation Act. In the present action, the plaintiff sought to be indemnified by the defendants under the Workmen's Compensation Act, 1925, s. 30. It was proved that the defendants had only recently acquired the estate in question, which was in a very neglected condition and contained thousands of dead trees. They had instructed a forestry expert to advise them and he had made a preliminary report. Pending his second report, the defendants had engaged two fellers to cut down certain trees :—

Held : (i) the plaintiff had taken the farm as it existed at the time of the lease, and the defendants were under no duty to him, a tenant, to see that any overhanging trees were not in a dangerous condition.

(ii) as the plaintiff himself could not have recovered from the defendants had he been injured by a falling branch, neither the workman nor his widow could have recovered, and the plaintiff was therefore not entitled to an indemnity.

(iii) (Bennett, J., dissenting) : on the facts of the present case, the defendants had taken reasonable steps to deal with the dead trees, and could not be said to have been negligent. The action therefore failed.

[**EDITORIAL NOTE.** The present case applies the decision in *Cheater* v. *Cater* (2) to the case of the fall of an overhanging branch. The *Cheater* case (2) was concerned with the injury to an animal through eating from an overhanging branch, and the position is the same in the case of a falling branch causing injury. The lessee takes the property as he finds it, and his workmen and guests can have no higher rights than he has himself.

As to Overhanging Trees, see HALSBURY, Hailsham Edn., Vol. 1, pp. 432, 433, para. 738 ; and for Cases, see DIGEST, Vol. 2, pp. 64-66, Nos. 403-418.]

Cases referred to:

(1) *Smith's Dock Co.* v. *Readhead (John) & Sons*, [1912] 2 K.B. 323; 34 Digest 496, *4095*; 81 L.J.K.B. 808; 106 L.T. 843; 5 B.W.C.C. 449.
(2) *Cheater* v. *Cater*, [1918] 1 K.B. 247; 2 Digest 65, *413*; 87 L.J.K.B. 449: 118 L.T. 203.
(3) *Robbins* v. *Jones* (1863), 15 C.B.N.S. 221; 31 Digest 347, *4895*; 33 L.J.C.P. 1; 9 L.T. 523.
(4) *Cavalier* v. *Pope*, [1906] A.C. 428; 31 Digest 348, *4900*; 75 L.J.K.B. 609: 95 L.T. 65; *affg.* [1905] 2 K.B. 757.
(5) *Lane* v. *Cox*, [1897] 1 Q.B. 415; 31 Digest 347, *4896*; 66 L.J.Q.B. 193: 76 L.T. 135.
(6) *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K.B. 551; Digest Supp.; 103 L.J.K.B. 321; 148 L.T. 287.
(7) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J. Ex. 161; 19 L.T. 220; *affg.* S.C. (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.
(8) *Bruce* v. *Caulfield* (1918), 34 T.L.R. 204; 2 Digest 66, *417*.
(9) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5; 2 Digest 65, *412*; 48 L.J.Q.B. 109; 39 L.T. 355.
(10) *Noble* v. *Harrison*, [1926] 2 K.B. 332; 36 Digest 189, *316*; 95 L.J.K.B. 813; 135 L.T. 325.
(11) *Lemmon* v. *Webb*, [1895] A.C. 1; 36 Digest 205, *472*; 64 L.J. Ch. 205; 71 L.T. 647.
(12) *Morgan* v. *Liverpool Corpn.*, [1927] 2 K.B. 131; Digest Supp.; 96 L.J.K.B. 234: 136 L.T. 622.
(13) *Makin* v. *Watkinson* (1870), L.R. 6 Exch. 25; 31 Digest 316, *4582*; 40 L.J. Ex. 33; 23 L.T. 592.
(14) *Smith* v. *Marrable* (1843), 11 M. & W. 5; 31 Digest 179, *3122*; 12 L.J. Ex. 223.
(15) *Cory & Son, Ltd.* v. *France, Fenwick & Co., Ltd.*, [1911] 1 K.B. 114; 34 Digest 496, *4094*; 80 L.J.K.B. 341; 103 L.T. 649.
(16) *Cockburn* v. *Smith*, [1924] 2 K.B. 119; 31 Digest 102, *2392*; 93 L.J.K.B. 764; 131 L.T. 334.

Appeal from a decision of Greaves Lord, J., dated Mar. 15, 1937. The facts of the case are fully set out in the judgments.

Harold Murphy, K.C., and *C. L. Henderson* for the appellant, the plaintiff.

H. I. P. Hallett, K.C., and *G. J. Paull* for the respondents, the defendants.

Murphy, K.C.: It is admitted that a branch of a tree is not covered by the doctrine of *Rylands* v. *Fletcher* (7), but it is within the maxim *sic utere tuo ut alienum non lædas.* Further, in this case there was negligence. The tree was obviously dead. The right to lop was reserved to the landlord by the terms of the lease, and so the tenant had no right to prune. There was clearly a duty on the defendants to see that an overhanging tree was safe, or to warn the plaintiff. [Counsel referred to *Bruce* v. *Caulfield* (8) and *Cunard* v. *Antifyre, Ltd.* (6).] In *Crowhurst* v. *Amersham Burial Board* (9), it was held that there is a duty on the owner of yew trees to prevent branches from overhanging and poisoning a neighbour's cattle. [Counsel also referred to *Noble* v. *Harrison* (10).]

Hallett, K.C.: There is a distinction between the relationship of adjacent owners and that of landlord and tenant. The timber was reserved, and so was the right to lop or prune timber on that farm, but that had nothing to do with trees growing off the farm. The plaintiff could have lopped this limb. He could have abated the nuisance: *Lemmon* v. *Webb* (11). [Counsel referred to *Morgan* v. *Liverpool Corpn.* (12) and *Makin* v. *Watkinson* (13).] A tenant takes premises with all their advantages and disadvantages: *Cheater* v. *Cater* (2). Where a landlord retains part of a premises, then he may be liable for the condition of the part retained: *Smith* v. *Marrable* (14). It would be a curious position if the tenant himself could not complain against a landlord, whereas a person invited by him on to his land could so complain. It is wrong in principle that the invitee should have a higher right. [Counsel referred to *Robbins* v. *Jones* (3) and *Cavalier* v. *Pope* (4).] There is no authority for the proposition that there is any duty as between an owner and a person frequenting nearby land. [Counsel referred to *Cory & Son, Ltd.* v. *France, Fenwick & Co., Ltd.* (15), *Cunard* v. *Antifyre, Ltd.* (6), and *Cockburn* v. *Smith* (16).] The test is to take reasonable care, and that the defendants did.

C. L. Henderson, in reply.

GREER, L.J.: This is an appeal by the plaintiff from the judgment of GREAVES LORD, J., in favour of the defendants. The relevant facts are not in dispute, or hardly in dispute. On May 30, 1936, a labourer on the Hackwood Farm, which adjoins part of the Hackwood Estates owned and occupied by the defendants, was working on a part of the farm which was near a beech tree the branches of which overhung the place where he was working. A branch fell from the beech tree and killed him, and his widow took proceedings against the plaintiff for workmen's compensation, obtaining an award of £273. The plaintiff's claim was to be indemnified by the defendants as provided by the Workmen's Compensation Act, 1925, s. 30.

It has been held by BRAY, J., in *Smith's Dock Co.* v. *John Readhead & Sons* (1), that the right to indemnity extends to a case in which the person to whom compensation has been paid is a dependant of the deceased entitled to compensation under the Workmen's Compensation Acts. That decision has been frequently acted upon since. I think that it is right, and that this court must act upon it in the present case. This case must be treated exactly as it would have been if the labourer Robinson had not been killed, but had himself asked for and received compensation.

The relevant facts may be summarised in the following way. On Jan. 20, 1936, the defendants' predecessors in title by lease of that date let the Hackwood Farm to the plaintiff. Thereafter the defendants purchased the Hackwood Estate, on which there were a great number of trees growing, many of them dead or dying. The group of trees which adjoined the place at which the deceased was working is known as the Pelican Wood. There were large numbers of trees on other parts of the estate. On Feb. 10, 1936, the defendants took possession of such part of the Hackwood Estate as had not been let to the plaintiff. They became the owners of the estate, and occupiers of the part which had not been let to the plaintiff and reversioners upon the plaintiff's term. The defendant company had been formed by Lord Camrose and possibly some members of his family, probably for the purpose of avoiding by lawful means part of the taxation that would have to be paid by the owner and occupier of the estate. At this time the branch of the tree which overhung the part of the farm in which the deceased was working was, like a great many other trees on the estate, partly dead. I shall call the tree "tree 16," and the branch which fell "branch 40." The numbers I am using have nothing whatever to do with the case; I use them only in order to avoid repeating such phrases as "the tree in question in the action" and "the branch of the tree which by falling caused Robinson's death."

The manager of the estate for the defendants was a Mr. Daniel. It appears from the correspondence that the deceased's claim was put forward on his behalf by the Co-operative Insurance Co., Ltd., but, the estate being legally owned, not by Lord Camrose, but by the Hackwood Estates Co., Mr. Daniel, as the agent of the defendants, answered the letter and denied liability.

Early in Apr., 1936, the defendants instructed a forestry expert, Mr. R. C. L. Mould, to advise them as to what should be done with regard to the trees on the estate, and Mr. Mould seems to have treated Lord Camrose as the person really interested in the need for advice with regard to improving the woods on the estate from the point of view of their sporting value and their value as an amenity of the estate. On Mar. 20, 1936, Mr. Mould went down to see the trees on the Hackwood Estate for the purpose of making a report to the company, or to Lord Camrose, advising what ought to be done. Mr. Mould took about three days to survey the trees on the estate sufficiently to enable him to advise what should be done. In the meantime, Mr. Daniel, the defendants' agent, had engaged men from White, a local timber man, to do any work that could be done while Mr. Mould was engaged in preparing his preliminary report. On Apr. 18, Mr. Mould signed his preliminary report, and sent it to Lord Camrose in the letter of that date. He was then asked to prepare a scheme for carrying out the views expressed in his preliminary report.

On May 5, he was told to go ahead with the preparation of his scheme, and on May 12 he went down to make a thorough examination of the trees on the estate. He took an assistant with him, and they were there for about 3 weeks, after which he produced his second report, dated June 26. Mr. Mould's advice in the second report contains the following rules in Part V headed "Programme of Cultural Operations":

> 2. The programme has been so arranged that birds in any one block which is

> being worked during the winter, may find at least one quiet wood in that block. 3. This rule will not apply rigidly to Spring Wood and the Park, as the removal of dead and dangerous trees must be given primary consideration.

Later on in the report he refers to "the necessity of clearing the Park and Spring Wood of unsightly and dangerous trees." Again, on p. 71 of his second report, Mr. Mould refers to the removal of trees dangerous to passers-by as one of the main objects of the scheme. Pelican Wood is part of the Park, and the words I have quoted appear to show that Mr. Mould was alive to the importance of making the trees in the Park safe. There is other evidence which seems to me to make it quite clear that, though nothing was mentioned in the written instructions which Mr. Mould received from the defendants, he was in fact told, possibly before his first report, certainly while he was being urged to prepare his second report, that he ought to have regard to the desirability of making the trees safe for people, who might otherwise be damaged by them or their branches. Mr. Daniel was asked this question in his evidence:

> Was there any person employed by Hackwood Estates between Feb., 1936, and June, 1936, who was competent to detect a tree which was dangerous either because of decay or for any other reason?

The answer he gave was:

> Yes. Captain Mould was brought there for that express purpose amongst other things.

Mr. Mould in his evidence says:

> I consider that I stressed in various places in both reports the necessity of dealing with the dangerous trees. The great difficulty was that there were so many it was difficult to know where to start. . . . Lord Camrose was interested to utilise the timber to the best advantage, naturally, like any other landowner would be, but he also was interested, and mentioned it to me more than once, in the necessity of making the park as safe as possible, and the whole estate as safe as possible from a tree point of view.

I think that the judge was entitled to hold on this evidence that, before the unfortunate accident to the deceased man Robinson, Mr. Mould was instructed, in preparing his scheme, to advise Lord Camrose as to the best way of making the trees safe to all who might otherwise be in danger from them. Tree 16 was not dead all the way from the root upwards, but it was dead from 16 ft. from the ground to its top. Branch 40 was in the dead part of the tree. It overhung Hackwood Farm when the plaintiff took his lease, and it was then on the part of the tree which was dead. It was dangerous and liable to fall, but the tree itself remained quite safe as a tree until Nov. 13, when it was cut down.

I should add that at the trial the defendants' counsel abandoned the claim which does appear in the statement of claim based on nuisance, and in the end he agreed that the judge might treat Lord Camrose and the Hackwood Estates Co. as if they were the same persons. They were in law different persons, but I understand the admission to mean that any instructions given by Lord Camrose must be taken to have been given with the authority and on behalf of the defendants. If the plaintiff's counsel had persisted in his contention that they were different persons, and that any instructions given by Lord Camrose were unauthorised, he ought to have objected to the evidence given by Mr. Mould about it, and to have maintained his contention that, until it was proved that Lord Camrose had the authority of the company to instruct Mr. Mould, any evidence as to what he did or said was irrelevant. If he had not given up the point, it probably would have been quite easy to prove that the directors, or such other persons as were entitled to represent the company, knew quite well that Lord Camrose was dealing with the question, and were content that he should do so. The appellants now raise the question which they abandoned at the hearing, and upon which, if they had not abandoned it, the defendants might have asked the judge to hear evidence, even after they had closed their case.

Mr. Hallett, for the respondents, supported the judge's judgment on a number of grounds on which I do not think it necessary to say anything, but I think that he was entitled to hold the judgment on two of the grounds on which he relied. The first of these grounds was that the plaintiff took the farm as it existed at the date of his lease, without any right to complain of dangerous branches of trees overhanging the boundary of his farm, and that his employees had no better rights than he had. He cited in support of his argument *Cheater* v. *Cater* (2), *Robbins* v. *Jones* (3), and the opinion of Lord Macnaghten in *Cavalier* v. *Pope* (4), at p. 430. It is not necessary to state in detail the facts on which the decision in *Robbins* v. *Jones* (3) turned. It is sufficient to say that the claim was in respect of an accident happening in a private place, or, alternatively, in a place which was part of the highway. The court consisted of Erle, C.J., Willes, Byles, and Keating, JJ., a court which it is not an exaggeration to describe as a strong court. In the course of his judgment, Erle, C.J., said, at p. 240:

> If the passage over the area be considered as a private way to the houses, then the reversioner is not liable, but the occupier. A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any.

Then he deals with the question as to the liability if the place where the accident happened was part of the highway.

In *Cavalier* v. *Pope* (4), Lord Macnaghten says, at p. 430:

> The law laid down by the Court of Common Pleas in the passage quoted by Sir Richard Henn Collins, M.R., from the judgment of Erle, C.J., in *Robbins* v. *Jones* (3) is beyond question.

Then he quotes the passage above-cited. The judgment of Sir Richard Henn Collins, M.R., in *Cavalier* v. *Pope* (4), in the Court of Appeal, was approved by Lord Macnaghten in the House of Lords, and affirmed by the House. In his judgment, Sir Richard Henn Collins, M.R., after referring to *Lane* v. *Cox* (5), continues, at p. 763:

> "It has been held," says Lord Esher, M.R., "that there is no duty imposed

on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant there cannot be a duty to a stranger. There was, therefore, no duty on the part of the defendant to the plaintiff, and there could be no liability for negligence."

The court followed the authority of a passage in the judgment in *Robbins*
A v. *Jones* (3) delivered by ERLE, C.J., but prepared by WILLES, J., at p. 240:

> A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house . . .

The opinions of the other Lords in *Cavalier* v. *Pope* (4) make no refer-
B ence to the law as laid down in *Robbins* v. *Jones* (3), but there seems to be clear authority for the proposition contended for by Mr. Hallett in the decisions of the Court of Appeal, in *Lane* v. *Cox* (5) and *Cavalier* v. *Pope* (4), and the approval by LORD MACNAGHTEN of the rule stated by the court in *Robbins* v. *Jones* (3). There is nothing in any of the other
C opinions in *Cavalier* v. *Pope* (4) which shows any disagreement with what LORD MACNAGHTEN said. It seems to me that, inasmuch as neither Robinson nor his widow could have succeeded in an action at common law against the defendants, it necessarily results that the plaintiff, having paid the workman's compensation, is not entitled to the indemnity
D which he claims.

The appellants cited the case of *Cunard* v. *Antifyre, Ltd.* (6) as an authority for the proposition that a landlord retaining part of the premises in his own control is liable to his tenant and his tenant's licensee for damage occasioned by his negligence in allowing the part of the
E premises retained in his control to fall into disrepair and become dangerous. The headnote of that case reads as follows:

> The defendants were the lessees and occupiers of a building which they were liable to keep in repair by the terms of their lease. The plaintiff, Mr. Cunard, occupied a flat on the third floor of the building with his wife, who was his co-plaintiff. This floor he held on a monthly tenancy from one M., who in turn held
> F the second, third and fourth floors from the defendants upon a lease which contained a covenant by M. to keep the demised premises in repair "drains and roof and damage by fire excepted." The effect of the various leases, as the court held, was that the main roof and guttering were vested in the defendants as occupiers. The plaintiffs' flat included a kitchen with a glass roof which projected beyond the back wall of the fourth floor immediately above. In Dec., 1931, owing to the defendants' neglect to repair, a heavy piece of guttering fell from the main roof of the building through the glass roof of the plaintiffs' kitchen, causing broken
> G glass to strike Mrs. Cunard and injure her. The plaintiffs claimed damages: HELD: that the defendants as occupiers were under a duty to take reasonable care that the guttering should not fall, and that the plaintiffs as occupiers of a flat in the same building should have been in their reasonable contemplation as persons closely and directly affected by neglect of that duty, and that the plaintiffs were entitled to succeed. It is immaterial that the tenements are part of the same structure. Causes of action in negligence and nuisance distinguished.

H The case was concerned with the liability to a sub-tenant of a landlord in respect of a part of the premises which he reserved for himself, but it does not appear that the dangerous condition of the roof was in existence at the time the lease was granted to the defendants' tenant of the whole building, nor was the attention of the Divisional Court, which consisted of TALBOT and ACTON, JJ., called to the distinction which in law exists between the liability of the occupier of property to an adjoining owner and his invitees or licensees and the liability of such an owner to his tenants of part of his estate and his invitees or licensees. I do not think that the case can be relied upon as in any way inconsistent with *Robbins* v. *Jones* (3) and *Cavalier* v. *Pope* (4) referred to above. If it is so inconsistent, the decision was wrong and is not binding on this court.

Inasmuch, however, as the point with which I have dealt was not raised at the trial, it seems right that I should express my view on the only question which the judge considered—namely, ought he to have decided that the defendants in fact were liable for negligence in failing to discover that tree 16 and branch 40 were in a dangerous state, and in failing to remove the whole of tree 16, or in any case to deal with the part of it which was in fact dangerous ? It was, I think, established beyond controversy that tree 16 was alive from the ground to 16 ft. above the ground, that from that point it was entirely dead, and that the condition of the tree was substantially the same, at the time that the plaintiff took the lease of the Hackwood Farm, as it was at the date of the unfortunate accident to Robinson. If negligence would make the defendants liable, I cannot say, in my opinion, that the judge was wrong in finding that the defendants were not negligent. I have already stated most of the facts on this question, but I also desire to call attention to the evidence of Mr. Daniel, the agent, as to his inspection of the trees which adjoined the plaintiff's farm, which was made in either February or March, soon after the defendants took possession. The evidence given by him proves that he did in fact go round the boundary between the Park and the plaintiff's farm, and that he must have seen all the trees, but that he could not say that he particularly noticed tree 16. He was not a forestry expert, and he either had called in, or was about to call in, men from a local timber man, White, who were better able than he was to decide which trees ought immediately to be dealt with. White's men appear to have felled trees which were overhanging some one or other of the roadways which ran through or round the estate, and, when Mr. Mould was called in, there were on the estate many hundreds of trees that were, to use Mr. Mould's words, "dangerous to passers-by." There were footways or cartways through the Park which had to be used by workmen engaged in work on the estate, and there were also many trees adjoining the plaintiff's farm which would require to be dealt with. What more could the defendants be expected to do in the exercise of reasonable care than to take the advice of a forestry expert as to the best method of dealing with the dangerous trees, and then leave it to the expert to see that his advice was carried out ? This is what the defendants, through Lord Camrose, did, and for my part I see no reason to differ from the judge in his decision that it was not established to his satisfaction that the death of the deceased man, Robinson, was occasioned by any negligence on the part of the defendants, or on the part of Lord Camrose acting on their behalf. It was, of course, impossible for anyone to attend to all the trees at the same moment. The work had to be done according to some plan, and, if the plan evolved by the expert was not the best in the circumstances, the defendants are not responsible for his failure to advise them to deal immediately with the trees which adjoined the plantiff's farm. For these reasons, I think that this appeal must be dismissed.

MACKINNON, L.J.: The claim of the nominal plaintiff against the defendants must be based upon an allegation that the defendants were negligent in not having cut down, or otherwise rendered innocuous, the tree from which a branch unhappily fell and killed the man Robinson. No evidence as to the constitution and directorate of the defendant company was given, but it was common ground that it was a private company representing the interests of Lord Camrose who had purchased the Hackwood Estate from Lord Bolton. The witness Mr. Daniel described himself as the agent of the defendant company, but evidence was also given, *e.g.*, by Mr. Mould, of the personal action of Lord Camrose in receiving the reports of Mr. Mould, and giving him directions.

The defendant company, according to Mr. Daniel's evidence, got possession of the estate on Feb. 10, 1936. This unhappy accident happened rather more than three months later, on May 30, 1936. If the defendant company is to be made liable, it must be on the ground of their negligent failure between those dates to exercise reasonable care to put an end to the danger of a branch of this particular tree falling and injuring someone within its reach.

It is apparent from the evidence that this estate had been very much neglected for many years. Mr. Mould in his preliminary report said that:

> since the War, both the Park trees and the woods have been sadly neglected, with the result that today many of the trees . . . in the Park and woods are quite dead.

In his evidence, he said that there were thousands of dead and dying trees on the estate.

This particular tree was a beech. It was dead in its upper parts, but the trunk was living up to 16 ft. As one who lives in the country, I suppose I may use my knowledge that the fear of branches falling from a beech is nothing like as great as that of their falling from an elm. Mr. Daniel or Lord Camrose could not be expected to know more about trees, or more of the danger of this tree, than Mr. Shirvell, the farmer. On taking possession of the estate in February, they must soon have become aware that there were thousands of dead and dying trees. The dead ones would obviously be more dangerous than the dying, the dead elms more dangerous than a dying beech. Exercising reasonable care, I think that they would resort to expert advice as to how to deal with these neglected woods, and that, perhaps without waiting for that, they would put on men to cut down the most obviously dead and dangerous trees. The latter would obviously be properly done where such trees were near thoroughfares or footpaths. I think that they did both these things. By Mar. 9 Mr. Daniel had engaged two men, whom he borrowed from White, a local timber man, and had set them to work. It was stated in evidence, and I believe I may use my own knowledge, that one cannot employ casual labour for cutting down trees, and that men capable of cutting down trees are not to be had in unlimited numbers in a district. White's men worked until Apr. 25, when White took them away for a job of his own. They came back on May 25, and on the day of this accident they were at work felling three elms which were thought to be dangerous, and which were alongside a public road.

The defendants, or Lord Camrose, also without undue delay, got expert advice as to the trees. There were some 500 acres of woods, and a park of over 500 acres containing many trees. Altogether, according to Mr. Mould, there were some 56,000 trees, excluding young plantations, and among them there were thousands of dead and dying trees. It is in this connection not unimportant to observe that the spot where this branch unluckily fell was an arable field. Rye-grass and clover were growing in it. There was no footpath, and it was one of the last places where anyone might be expected to be working. The plaintiff had been threshing in this corner of the field a year before, and had left a stack of straw and other remnants. The deceased and another man, as ill luck had it, were clearing up at this stack on the fatal day. and I suppose they were the only beings who had been within range of the tree for a year. Mr. Daniels was obviously speaking the truth when he said in his evidence that it would have been impossible to deal with all the thousands of dead and dying trees between Feb. 10 and May 30. Any one of them might have fallen, or shed a branch, on any day, and, if unluckily someone happened to be near and be injured, a charge of negligence against the defendants for not having felled that particular tree could have been made with as much force as here. If the tree or branch had fallen on a public road or footpath (if, for instance, it had been one of the three elms that White's men were actually dealing with on May 30), the charge could be made with more force than here. This was a lamentable accident. In all the circumstances, however, I think that the judge was not only justified, but also right, in coming to the conclusion that the plaintiff did not establish that the accident was due to the negligence of defendants, i.e., to their failure to take reasonable care.

This appeal therefore fails on the facts. That being so, I do not think that it is necessary to consider the question of law raised by Mr. Hallett, or to decide whether, assuming that the defendants were negligent, the plaintiff could recover, having regard to his relation to the defendants as their tenant. On that, I express no opinion, one way or the other.

Bennett, J. :- I agree that this appeal should be dismissed, but, since I base my judgment exclusively on the application of the facts to the law relating to the rights and liabilities towards one another of occupiers of adjoining parcels of land between whom there exists the relationship of landlord and tenant, I desire to state the case as it presents itself to my mind. The plaintiff was, on May 30, 1936, the occupier of Hackwood Farm, Basingstoke. He was in occupation under a tenancy agreement made on Jan. 20, 1936, between the Bolton Estates Co., Ltd., as landlords, and himself as tenant. There was included in the land let to the plaintiff a close known as Park Piece. Park Piece was bounded on the west by a wood known as Pelican Wood. This wood was on Jan. 20, 1936, owned by the Bolton Estates Co., Ltd. On this date there was a beech tree growing in Pelican Wood, and growing from this beech was a branch, attached to the trunk at the height of about 40 ft. from the ground. This branch extended over Park Piece. On Jan. 20, 1936, the beech was a dying tree, and was then dead upwards from a height of 16 ft. from the ground. The overhanging branch was there in a dangerous state, and liable to fall at any moment.

The defendants are an unlimited company, incorporated under the Companies Acts. They purchased from the Bolton Estates Co., Ltd., Hackwood Park and Pelican Wood and the reversion expectant upon the determination of the plaintiff's tenancy to Hackwood Farm. They entered into possession of Hackwood Park and Pelican Wood on Feb. 10, 1936.

On May 30, 1936, one Robinson, a farm labourer employed by the plaintiff, was at work in Park Piece near Pelican Wood when the branch of the beech tree I have mentioned broke away from the trunk without warning, struck Robinson, and killed him.

Robinson's widow claimed compensation from the plaintiff under the Workmen's Compensation Acts. The plaintiff admitted his liability, and on Aug. 10, 1936, he paid into court for the widow the sum of £273. He brings this action against the defendants on the footing that, by virtue of the provisions of the Workmen's Compensation Act, 1925, s. 30, they are liable to indemnify him in respect of this payment.

The defendants did not plead, nor did they argue, that the provisions of the section were not available to the plaintiff, and therefore I assume that the plaintiff can recover if he can prove that Robinson was killed in circumstances creating a liability in the defendants.

The trial judge decided the case in favour of the defendants, because, to quote his own words:

> the only effective cause of action which really could be called in aid by the plaintiffs was the cause of action for negligence, which was the one cause of action the plaintiff had in right of the deceased man, and that on the evidence that action fails because there is no substantive proof of negligence on the part of the defendants.

With all respect to the judge, I find myself unable to agree with this conclusion.

If, on May 30, 1936, the plaintiff had been the owner of Park Piece and the defendants had been the owners of Pelican Wood, I should have decided in favour of the plaintiff, on the ground that the defendants had failed to take reasonable care to see that a branch of a tree growing on their land was not in a dangerous condition.

It was clearly proved that, when the defendants went into occupation of Pelican Wood on Feb. 10, 1936, the fatal branch was overhanging Park Piece, and was dangerous. Three-and-a-half months later, it fell, and killed Robinson. Proof of these facts by the plaintiff, in my judgment, cast upon the defendants the burden of proving affirmatively that they had taken reasonable care to see that it was not dangerous.

The defendants are a corporation, and the proof must therefore be that their agents had used reasonable care. They called two witnesses, Mr. Daniel and Mr. Mould. Mr. Daniel was the agent of the defendants, and had the management of the Hackwood Park Estate on behalf of the defendants. Mr. Mould was a forestry expert, who had been consulted by the defendants in 1936 for purposes to which I shall presently have to refer.

It was plain from the evidence of those witnesses that, when the defendants went into occupation of the Hackwood Park Estate in Feb., 1936, the timber standing thereon had been much neglected by the defendants' predecessors in title. The estate was an extensive one, with a considerable quantity of timber on it. Many standing trees in the park and woods were dead, many had passed their maturity, and blown trees were lying everywhere. If the defendants had really exercised reasonable care to do their duty by their neighbours, nothing would have been easier than to prove it. Mr. Daniel could have told the court what steps he took, and what orders he gave to deal with dangerous trees overhanging either highways or the property of neighbouring landowners, and the court would then have been in a position to judge as to whether or not the steps he had taken were reasonable, in the circumstances. Mr. Mould could have told the court what instructions he had received before he made his report, and from whom he had received them; then, with this information before it, the court would have been able to form a judgment upon the reasonableness or otherwise of the defendants' conduct.

I regard Mr. Daniel's evidence as failing to prove that the defendants acted reasonably in regard to overhanging trees. It leaves my mind quite uninformed as to the purpose for which Mr. Daniel consulted Mr. White, the advice (if any) he got from him, the purposes for which the two tree-fellers were employed, or any other relevant matter. It entirely fails to prove that the defendants recognised the existence of any duty towards their neighbours, or that the defendants took any steps to discharge it. It does show that there were steps which the defendants might easily have taken, had they been so minded, and that they never took them.

Mr. Mould's evidence on the only question that matters is even more useless than that of Mr. Daniel. He said that he was introduced to the

defendants at the end of Feb., 1936. He did not name the person to
whom he was introduced. He did not say from whom he got his instructions,
or what they were. I have a shrewd suspicion, gathered from a
perusal of his first report, that, when he wrote it (and it is not addressed
to anybody), he did not regard himself as advising the defendants ; for
A the report, which was made on Apr. 18, deals, amongst other things,
with the deduction from sur-tax returns of the costs of clearing, draining,
fencing, planting, and so on, and with deductions which can be made
upon a valuation for death duties. The defendants, being a company,
are, of course, not burdened with either of these duties. However that
B may be, it is quite obvious from the opening paragraph of the report
that Mr. Mould had examined the timber on the Hackwood Park Estate
in order to ascertain the possibilities of its improvement and development
as an amenity, from a shooting and a timber-producing aspect.
He was obviously not instructed to see that trees dangerous to the
C defendants' neighbours were made safe. His reports speak for themselves.
His second was not made until June, when Robinson was
dead. The first contains not a single reference to dangerous trees, and
not a word as to dealing with any such trees, nor any indication of his
having had any regard to the defendants' duties to their neighbours.

D The witness, in cross-examination, did say that Lord Camrose, who
is said to be the biggest shareholder in the defendant company, said more
than once that he was interested in the necessity of making the Park
as safe as possible, and the whole estate as safe as possible, from a tree
point of view. The witness, however, did not state when Lord Camrose
E expressed his interest in this vital matter, whether it was before or after
Robinson had been killed, nor did he state whether he got from Lord
Camrose any instructions as to how or where dangerous trees were to
be dealt with.

Holding, as I do, that the facts proved by the plaintiff had shifted the
F burden of proof from his shoulders on to those of the defendants, I
should have decided that, if the defendants had been under a duty to
the plaintiff to see that any tree growing on this land and overhanging
his was not in a dangerous condition, they had wholly failed to discharge
it. I believe the truth to be that they never realised that they were
G under any duty to their neighbours, and so never at any time considered
how to deal with dangerous trees growing along their boundaries.

Unfortunately for the plaintiff, he was not at any time owner of Park
Close. He was a mere tenant, under a tenancy agreement made between
himself and the defendants' predecessors in title at a date when the fatal
H branch was in a dangerous state and was overhanging Park Piece. It is
settled by *Cheater* v. *Cater* (2) that the plaintiff himself could have had
no cause of action in respect of injuries caused by the fall on to Park
Piece of the fatal branch, and by *Robbins* v. *Jones* (3) and the high
authority of LORD MACNAGHTEN in *Cavalier* v. *Pope* (4), at p. 430,
that his servant Robinson had no better case than had his master. On

this ground, the plaintiff's action was, in my judgment, foredoomed to failure. On this ground, in my judgment, the appeal fails, and must be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *W. Stanley Eastburn* (for the appellant); *L. Bingham & Co.* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

BOSCH *v.* PERPETUAL TRUSTEE CO., LTD.

[Privy Council (Lord Wright, Lord Romer, Sir Sidney Rowlatt, Sir George Rankin), **February 1, 3, 22, 1938.**]

Privy Council—New South Wales—Will—Inadequate provision for testator's infant sons—Discretion of the court to order provision for " proper maintenance, education, or advancement in life "—Testator's Family Maintenance and Guardianship of Infants Act (*New South Wales*), 1916, *No.* 41, *s.* 3 (1).

A testator, by his will and codicils thereto, bequeathed to his wife, upon trusts, legacies of an approximate value of £10,000, and a life annuity of £1,000, reducible on re-marriage to £500. He further directed his trustees out of his residuary estate to appropriate and set apart and invest a sum of £15,000 each for his two infant sons upon certain trusts, and bequeathed the whole of his residuary real and personal estate to the University of Sydney. The testator was a man of considerable wealth, who, during his lifetime, and while still a bachelor, had made a gift to the respondent university of land and personal estate of an aggregate value of £220,000. His estate for probate purposes was sworn at the net amount of just over £257,000. The testator's widow took the view that the provisions made for her were not adequate for her proper maintenance, and instituted proceedings under the Testator's Family Maintenance and Guardianship of Infants Act, 1916, s. 33 (1). Similar proceedings were instituted by the next friend of the infant sons, for an order that the legacies bequeathed to each of them should be increased to £25,000. The widow's application was successful, and as a result she received a sum of £33,800, free of all duties, and an annuity for her life of £2,000 a year, in substitution of the pecuniary benefits to which she was entitled under the will and codicils. The court declined to make any order increasing either of the two legacies bequeathed to the infant appellants:—

Held: each of the infant appellants should receive a further sum of £10,000. The fact that an increase had been made in the provisions made by the testator for his widow was not a valid reason for refusing to increase the appellants' legacies. There could be no certainty that the existing state of affairs would not in the future be materially altered. The widow might re-marry and have further children, and her second husband might be a man of slender means, so that the provision made for her might be no more than sufficient to enable her to make provision for the maintenance of her second husband and the children of the second marriage. It could not be predicted that the appellants would benefit in any way by the order in question.

[EDITORIAL NOTE. The fact that a bill is at present before Parliament dealing with the subject of family maintenance adds importance to this case in England. In the Dominions, where Acts providing for the maintenance and protection of the testator's family have been in force for some years, the consideration by the Privy

Council of the proper effect to be given to the possibility of the widow remarrying will be found of considerable assistance.

FOR CASES ON TESTATOR'S FAMILY MAINTENANCE AND PROTECTION, see DIGEST, Vol. 44, pp. 1289, 1290.]

Cases referred to:

A (1) *Allardice* v. *Allardice*, [1911] A.C. 730; 44 Digest 1289, case *g*.
(2) *Re Allen, Allen* v. *Manchester*, [1922] N.Z.L.R. 218.
(3) *Re Hawke, Hawke* v. *Public Trustee*, [1935] N.Z.L.R. 157; Digest Supp.
(4) *Welsh* v. *Mulock*, [1924] N.Z.L.R. 673.
(5) *Collins* v. *Public Trustee*, [1927] N.Z.L.R. 746.
(6) *Re Richardson*, [1920], S.A.L.R. 24.
B (7) *Re Fuller*, [1917] S.R.N.S.W. 348.

APPEAL from a judgment of the Supreme Court of New South Wales (in equity) (NICHOLAS, J.), dated Dec. 11, 1936, whereby an application for further provision to be made out of the estate of the testator for the maintenance, education and advancement of the infant appellants was
C refused. Leave to appeal to the Judicial Committee of the Privy Council from the said refusal was granted by order (NICHOLAS, J.), dated July 28, 1937.

The facts of the case are set out in the judgment of their Lordships delivered by LORD ROMER.

D *H. B. Vaisey, K.C.*, and *W. T. Elverston* for the appellants.

J. N. Gray for the respondent Gwendoline Bosch, the mother of the appellants and widow of the testator.

F. R. Evershed, K.C., and *A. C. Nesbitt* for the respondent, the University of Sydney.

E *Vaisey, K.C.:* The testator, by his will and codicils, has disposed of his property in such a manner that the appellants are left without adequate provision for their proper maintenance, education, and advancement in life. NICHOLAS, J., did not pay sufficient regard to the circumstances of this case. He was in error in holding on the
F evidence before him that the available income would be sufficient to enable the appellants to be educated at Oxford or Cambridge, and in effect that any young man, irrespective of the circumstances, who has a sum of £15,000 in cash, must necessarily be adequately provided for thereby. He was in error in holding that the Act was not intended to
G apply to this type of case, and accordingly failed to exercise properly the discretionary power vested in him by the Act. No regard ought to be paid to the possible benefits which may accrue to the appellants under their mother's will; it must be problematical at best. [Counsel referred to *Re Hawke, Hawke* v. *Public Trustee* (3), *Re Allen, Allen* v.
H *Manchester* (2), *Welsh* v. *Mulock* (4), *Allardice* v. *Allardice* (1), *Collins* v. *Public Trustee* (5). Counsel also referred to THE PRINCIPLES AND PRACTICE OF TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND, by H. H. Mason, A. C. Tuthill, and C. G. Lennard, 1929; and to THE LAW RELATING TO TESTATOR'S FAMILY MAINTENANCE IN NEW ZEALAND, by A. C. Stephens, 1934.]

Gray: My client is here as a necessary party. As the mother of the appellants, she would welcome further provision for them out of the testator's estate, but humbly submits that such provision, if made, should, in the circumstances, be made in such manner as not to reduce the provision made for her by the order of the Supreme Court of New South Wales, dated Nov. 29, 1935. A

Evershed, K.C.: The net residue at present falling to the university would be between £60,000 and £70,000, and a further £50,000 would fall due under the reversion on the widow's death. The respondent during the testator's life had benefited largely from his generosity, and did not think fit to offer opposition to the application for further provision B to the widow, but, while not opposing such application, the respondent does not admit that the court had jurisdiction under the statute to decree it. Under the will, and taking into consideration all the circumstances of the case, adequate provision is made for the proper maintenance, education, and advancement in life of the appellants, and the C standard by which proper maintenance falls to be determined is one, not of generosity, but of strict justice. The application is founded on a misconception of the true intention, scope and effect of the statute. Any order made under the statute is a discretionary order, and a *bona fide* exercise of such discretion by the local court, entrusted with the D administration of the statute, and acquainted with the local conditions and standards of living, ought not in any case to be disturbed. [Counsel referred to *Re Richardson* (6), *Re Allen, Allen* v. *Manchester* (2), *Allardice* v. *Allardice* (1), *Collins* v. *Public Trustee* (5), *Re Fuller* (7).]

Vaisey, K.C., in reply. E

LORD ROMER: This appeal is concerned with a statute of New South Wales, the short title of which is the Testator's Family Maintenance and Guardianship of Infants Act, 1916, s. 3 (1). The subsection, so far as material for the present purpose, is as follows: F

> If any person (hereinafter called "the testator") dying or having died since Oct. 7, 1915, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such G provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them.

The circumstances in which the appeal comes before this Board are these. George Henry Bosch (hereinafter called "the testator"), who died on H Aug. 30, 1934, was married once only, viz., on Oct. 11, 1929, to the respondent Gwendoline Bosch, then a spinster. Of that union a son was born on Jan. 20, 1931, such son being the appellant Henry Bosch. On Dec. 29, 1932, the testator made his will. By cl. 1 he appointed the respondents Gwendoline Bosch and the Perpetual Trustee Co., Ltd., executors and trustees thereof. By cll. 3-10 he bequeathed to or upon trusts for the respondent Gwendoline Bosch free of duty divers specific and pecuniary legacies of an approximate value of £10,000, and a life annuity of £800, reducible on remarriage to £400. By cl. 11 the testator directed his trustees to set aside and invest a sum of £15,000 (therein called his son's fund) upon trust with such consent or at such discretion as therein mentioned to apply so much of the income thereof as his trustees should think proper for the maintenance, benefit, education or advancement in life of his son the appellant Henry Bosch until he should attain the age of 25 years, and upon his attaining that age upon trust for the appellant Henry Bosch absolutely. By cll. 14, 15, the testator directed that, if his said son or any other person should, before his said son should attain the age of 25 years, take any proceedings in court to compel his trustees to pay any part of the capital of his son's fund, or if his said son should do or attempt to do any act whereby his son's fund or any part thereof or the income or any part thereof would or might become vested in or payable to any other person, the son's fund and any unapplied income thereof should fall into his residuary estate. By cl. 16 the testator provided that, if his said son should die before attaining the age of 25 years without leaving any child or children him surviving, then his son's fund and all accumulations of income thereof should fall into his residuary estate. The fund and such accumulations of income were otherwise to be held in trust for such child or children as therein mentioned. By cll. 17, 18, the testator bequeathed divers legacies of comparatively trifling amounts to persons not parties to this appeal, and by cl. 19 he devised and bequeathed the whole of his residuary real and personal estate to the respondents, the University of Sydney.

On May 24, 1933, there was born a second son of the testator, namely, the appellant Edward Graham Bosch, and on July 4 of the same year the testator executed a second codicil to his will. By such codicil he increased the amount of the annuity to his wife to £1,000, reducible on re-marriage to £500, and directed his trustees out of his residuary personal estate to appropriate and invest the sum of £15,000 and hold the same for his son Edward Graham upon trusts similar in all respects, *mutatis mutandis*, to those contained in his will in respect of the sum of £15,000 therein directed to be held in trust for his son Henry.

The testator had no further children, and, as already stated, died on Aug. 30, 1934. He was a man of considerable wealth, his estate for probate purposes being sworn at the net amount of just over £257,000. This sum would have been considerably larger had it not been for the fact that in 1928, and therefore while still a bachelor, he had made to the University of Sydney a gift of land and personal estate of the aggregate value of £220,000 or thereabouts.

The respondents, the Perpetual Trustee Co., Ltd., and Gwendoline Bosch, having in due course proved the will and codicils, appropriated and set aside in satisfaction of each of the said sons' legacies of £15,000 certain investments which their Lordships are given to understand will produce for each son a net annual income of £502 17*s*. 2*d*. or £491 7*s*. 10*d*. (Australian currency), according to whether the son resides within or outside New South Wales.

Apart from the provisions made for them by the will and second codicil of the testator, the two infant sons have no property or means. Their Lordships have no information as to whether the same observation would have been applicable to the testator's widow at the date of his death. However this may be, she took the view that the provisions made for her by her husband's will and codicil were not adequate for her proper maintenance, and on Nov. 11, 1935, she instituted appropriate proceedings in the Supreme Court of the State of New South Wales (in equity) under the subsection to which their Lordships have already referred. On the same day, similar proceedings were instituted by the next friend of the infant sons. The widow's application was heard on Nov. 29, 1935, by Nicholas, J. It proved successful. The judge ordered the trustees of the will to pay to the widow out of the estate of the testator free of all duties the sum of £33,800, and an annuity for her life of £2,000 a year as from the death of the testator. He further ordered that the provision so made for the applicant should be in substitution for all benefits to which she was entitled under the will and codicils other than a bequest to her of the testator's jewellery, wearing-apparel, household furniture, goods and effects. It is stated on behalf of the respondents, the University of Sydney, that they offered no opposition to this order. Their Lordships, of course, accept that statement. It is plain, however, that the judge must have been satisfied that the widow had been left without adequate provision for her proper maintenance. Otherwise he would have had no jurisdiction to make the order.

The application of the infant sons came on for hearing before the same judge on Oct. 23, 1936. It was supported by an affidavit (amongst others) of a Sydney solicitor, Mr. H. M. Taylor, who deposed to the following facts: that shortly before his death the testator had several discussions with the deponent with a view to the preparation of a new will: that the testator was particularly exercised in his mind upon two matters in connection with his testamentary dispositions as they then stood, such matters being, so far as material for the present purpose, (*a*) the effect of the forfeiture clauses contained in cll. 14, 15, of the will, and (*b*) the fact that, having regard to money values and the declining rate of interest, he had made inadequate provision for his widow and children in his will. The affidavit further stated that during these discussions it was emphasised that, since the existing will was made, rates of interest had considerably fallen, and that it was not unlikely that they might continue to fall; that in these circumstances the testator considered that the bequests to his two children ought to be considerably increased; that he definitely determined to increase the amounts thereof, though he had not at the date of his death finally settled by how much; that, while the testator expressed the view that, notwithstanding the fact that he was a wealthy man, he did not wish his sons to be similarly wealthy, yet he was obviously feeling that the provision he had made for each of them was quite inadequate, having regard to the very large A amounts he had given, and was giving, to the university, and also having regard to the fact that the income from the bequest of £15,000 to each son would be, and would be likely to be, considerably less than the income he had expected when making his existing will. The judge, however, declined to make any order increasing either of the two legacies. B He merely ordered that the provisions made by the will and codicil be varied by deleting cll. 14, 15, of the will, and ordered that the trustees were to be at liberty to expend such portion of the corpus of each son's fund as they should think fit for the advancement and benefit of that son until that son should attain the age of 25 years. He directed the C costs of all parties to the application to be paid or retained out of the estate of the testator.

On Dec. 11, 1936, and before the last-mentioned order had been drawn up, the two sons by their next friend restored their applications supported by some further evidence. Such further evidence consisted D of two affidavits by the widow of the testator and an affidavit of a Mr. Murray. The widow stated that during the year ending in June, 1930, during which she and the testator travelled extensively, the testator's expenditure was approximately £6,000, and that during the year ending June, 1931, they lived on the same scale; that their living E expenses during the years ending June, 1933, and June, 1934, were approximately £3,000 and £2,200 respectively. She also deposed as follows:

> It is my intention to ensure as far as possible that my sons should have every advantage and inducement to mould their lives and futures on lines that my late husband would have wished, and consequently, if my sons, or either of them desire F at any appropriate age to study at Oxford or Cambridge or any other university abroad I intend that they should have the opportunity to do so.

Mr. Murray in his affidavit stated that, after taking his degrees at the University of Sydney, he proceeded to the University of Cambridge, where he spent one academic year, and he estimated that the total cost G of one year at the latter university, including vacations, was £750. NICHOLAS, J., however, declined to add anything to the order he had made on Oct. 23, 1936, and ordered the next friend to pay the costs of all parties (other than the applicants) of the further hearing. A formal order was thereupon drawn up, embodying the order made on H Oct. 23, 1936, and the order made on the further hearing, the whole of the order being dated as of Dec. 11, 1936. It is from so much of that order as constitutes a refusal to increase the two sums of £15,000 and orders the next friend to pay the costs of the further hearing that the present appeal has been brought to His Majesty in Council, leave for that purpose having been obtained from NICHOLAS, J., on July 28, 1937.

Before stating the reasons given by the judge for taking the course that he did, their Lordships think that it will be convenient to consider carefully the language and effect of the subsection with which the appeal is concerned.

The first thing to be noticed is that the powers given to the court arise only when any of the persons mentioned is left without adequate provision for his or her proper maintenance, which word will be used in this judgment, where necessary, as including education and advancement. The use of the word " proper " in this connection is of considerable importance. It connotes something different from the word " adequate." A small sum may be sufficient for the " adequate " maintenance of a child, for instance, but, having regard to the child's station in life, and the fortune of his father, it may be wholly insufficient for his " proper " maintenance. So, too, a sum may be quite insufficient for the " adequate " maintenance of a child and yet may be sufficient for his maintenance on a scale that is " proper " in all the circumstances. A father with a large family and a small fortune can often afford to leave each of his children only a sum insufficient for his " adequate " maintenance. Nevertheless, such sum cannot be described as not providing for his " proper " maintenance, taking into consideration " all the circumstances of the case," as the subsection requires shall be done. In the next place, it is to be observed that, when the condition precedent to the exercise of the powers given by the subsection is shown to be fulfilled, those powers extend to making such provision as the court thinks fit for " such " maintenance—that is to say, for proper maintenance. The task thus imposed upon the court is obviously one of great difficulty. Upon what principles is the court to act in determining what constitutes proper maintenance ? This is a question that has been discussed in several cases to which their Lordships' attention has been directed. They are for the most part decisions of the New Zealand courts. For New South Wales is not the only legislature in Australasia that has made statutory provisions of the nature now in question. Indeed, every legislature in Australasia has done so, and of them New Zealand appears to have been the pioneer. The provision now in force in that Dominion is contained in the Family Protection Act, 1908, s. 33 (1), and is in the same form for all practical purposes as that of the provision with which this appeal is concerned. The principal differences in language are that in the New Zealand statute the words " maintenance and support " are used instead of " maintenance, education and advancement," and the court is not in terms directed to take into consideration all the circumstances of the case, although such words would seem to be necessarily implied.

Of the cases cited, their Lordships desire particularly to refer to that of *Allardice* v. *Allardice* (1), a decision of the Court of Appeal of New Zealand that ultimately came before this Board. In that case, Sir Robert Stout, C.J., stated the principles to be followed by the court in administering the Family Protection Act, 1908, s. 33 (1). They could, he said, be summarised as follow : (i) That the Act is something more than a statute to extend the provisions of the Destitute Persons Act ; (ii) that the Act is not a statute to empower the court to make a new will for a testator ; (iii) that the Act allows the court to alter a testator's disposition of his property only in so far as it is necessary to provide for the proper maintenance or support of wife, husband or children where adequate provision has not been made for this purpose ; (iv) that in the case of a widow the court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves. Later on he said, at p. 970 :

> The whole circumstances have to be considered. Even in many cases where the court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support ; and the second what property has the testator left.

With these observations of Sir Robert Stout, C.J., their Lordships are in agreement. The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the court were concerned merely with adequacy, but the court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration. So, too, in the case of children, a material consideration is their age. If a son is of mature, or nearly mature, age, his needs, both for the present and for the future, can be estimated without much difficulty. In the case, however, of a son of tender age, although his immediate needs can be readily ascertained, it is extraordinarily difficult even to guess what his needs may be in the future. Where, therefore, the testator's estate is a large one, the court will be justified in such a case in making provision to meet contingencies that might have to be disregarded where the estate is small. In the same case, Edwards, J., expressed himself as follows, at p. 972 :

> It is the duty of the court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving husband or father owes towards his wife or towards his children, as the case may be. If the court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the court to make such an order as appears to be sufficient, but no more than sufficient, to repair it.

Their Lordships agree that in every case the court must place itself in the position of the testator, and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than as a fond and foolish, husband or father. This no doubt is what the judge meant by a just but not a loving husband or father. As was truly said by Salmond, J., in *Re Allen, Allen* v. *Manchester* (2), at p. 220 :

> The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to

> the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.

The case of *Allardice* v. *Allardice* (1) when it came before this Board by way of appeal was dismissed, as it appeared to their Lordships that the Court of Appeal in New Zealand had exercised a discretion in the matter. Their Lordships, however, stated that they saw no reason to differ from the judges of the Court of Appeal in the general view they had taken as to the proper scope and application of the powers conferred upon them by the Act. Referring to the facts of the case, they said, at p. 734:

> These are essentially questions for the discretion of the local courts who are entrusted with the administration of the Act. They are well acquainted with all the local conditions as to employment, standard of living, and other matters necessary to be borne in mind in adjudicating on questions of this class, and their Lordships would be slow to advise any interference with the discretion founded upon such knowledge.

These observations must be carefully borne in mind in dealing with the present appeal. If the judge, whose decision this Board is now called upon to review, has directed himself properly as to the principles applicable to the case, and in so directing himself has exercised his discretion in the matter, their Lordships would indeed be slow to advise any interference with the discretion so exercised. In these circumstances, it becomes necessary to consider the reasons that were given by NICHOLAS, J., for refusing to increase the legacies provided by the testator for his two infant children.

No record appears to have been kept of what was said by the judge on the first occasion that their application came before him, but, upon the renewal of their application, on Dec. 11, 1936, he expressed himself as follows:

> The application . . . rests on a view of the Act which appears to me to be wholly erroneous. It rests, it seems to me, on the belief that a young man has not been given adequate provision for his proper maintenance, education or advancement in life unless he is able to attend one of the English universities. I think that is a fallacy.

He then referred to Mr. Murray's estimate of the cost of going to one of those universities as being another fallacy, and said:

> The application rests on the equally fallacious belief that a young man who has the sum of £15,000 in cash has not adequate provisions for his proper maintenance, education and advancement in life. In my opinion the Act was not intended to provide for a case of this sort at all.

Pausing there, it is to be observed that the judge is not dealing merely with the particular case before him. He seems to be expressing a view of the Act that is of general application, and that this is so is strongly corroborated by what he said when giving leave to appeal to His Majesty in Council. He said that the question was one of great general public importance, that a view of the Act was put forward which to his mind was untenable, and that it was a new view of the application of the Act, and one which had not yet been considered by a Court of Appeal. What was the view of the Act taken by the judge ? It seems to have been that, whatever the fortune left by his father might be, whatever might be his station in life, and whatever might be his plans for his future career—in other words, whatever might be the circumstances of the case—no young man who was in possession of a sum of £15,000 could bring himself within the Act, and the fact that a young man was unable, in view of the means available for his maintenance, education and advancement, to attend one of the English universities was, in all circumstances, a wholly irrelevant consideration. Their Lordships are unable to take this view of the Act. Leaving out of consideration sums that are obviously fantastic, it cannot be said of any particular sum, such as £15,000 for instance, that it affords proper maintenance, education and advancement in all conceivable circumstances. The subsection in question contains no other limitation than is involved by the words " proper " and " all the circumstances of the case," and their Lordships would strongly deprecate the introduction into the subsection of any limitation by reference to a particular figure or any limitation by reference to the kind of education for which provision should be made.

NICHOLAS, J., gave further reasons for refusing to increase the appellants' legacies. He said :

> Nor was it [i.e., the Act] intended to provide for a case in which the testator has intended to alter his will but by an unfortunate accident his solicitor has not made his arrangements in time, or for a case in which the mother of the infant has ideas for his education or mode of living which she thinks entail a greater expenditure than is provided for in the will.

Here again the judge seems to be expressing a general view of the Act, and here again their Lordships, with all respect, find themselves unable to agree with him. It is true that, in many, and, perhaps, in most, of the cases with which the court is called upon to deal, the testator has deliberately omitted to perform the duty that he owes of making proper provision for his wife and children. In such cases, the intentions and wishes of the testator plainly can carry no weight with the court. In other cases, the testator's omission to perform that duty will have been due to some mistake or oversight, and in such cases the wishes of the testator may legitimately be taken into consideration. So, too, in the case of the mother of the testator's children. If she appears to be a just and wise mother, her opinions and her wishes are not to be excluded from the circumstances of the case, to which under the Act the court has to pay attention, and this is especially the case where the children are of tender age.

The judge concluded his statement of the reasons by which he was actuated in coming to his conclusion in the following terms :

> When the will is taken into consideration with the orders already made under the Testator's Family Maintenance Act this family will have an annual income in excess of what it had previously been spending ; and all I can say is that on my

> view of this Act I cannot make any addition to the order which I have already made.

One of the orders to which the judge was referring was the order made upon the application of the testator's widow, but the provision for her made by that order was not made subject to any condition as to her contributing thereout anything to the maintenance, education or advancement of the appellant children. That she would in fact do so if the present state of affairs were to continue may be readily conceded, but there can be no certainty that the present state of affairs will not in the future be materially altered. The widow, for instance, might remarry, and have further children. Her second husband might be a man of slender means, and the provision made for her by the order of Nov. 29, 1935, might be no more than sufficient to enable her to make provision for the proper maintenance of her second husband and the children of her second marriage. It cannot, therefore, be predicted that the appellants will benefit in any way by the order in question. In these circumstances, it is not, in their Lordships' opinion, a valid reason for refusing to increase the appellants' legacies that an increase has been made in the provisions made by the testator for his widow. In considering all the circumstances of the case, the judge should have borne in mind that the circumstances as they exist at present will not necessarily remain unchanged, and in omitting to do so he has, in their Lordships' opinion, inadvertently misdirected himself.

For these reasons, their Lordships are of opinion that the discretion of the judge must be reviewed, and that, inasmuch as they are in possession of all the material facts, they should indicate how, in their opinion, the discretionary power given to the court by the subsection in question should be exercised in the present case. The task of exercising the power must always be one of great difficulty and delicacy. It must always be one largely of guess-work, especially in a case like the present, which is concerned with children of tender age, of whose needs in the future nothing can be predicted with any certainty. Guiding themselves, however, by the principles which have been discussed in an earlier part of this judgment, bearing in mind that the testator died possessed of a fortune of over a quarter of a million pounds, that he himself just before his death was of the opinion that the provision made for his sons by his will and second codicil was inadequate in the circumstances, and that he was a person who, to say the least of it, was not likely to take an exaggerated view of what would constitute proper maintenance, education and advancement, bearing in mind also the tender age of the appellants and the possibility, therefore, that, by the time they are of an age to embark upon a career or to marry, the value of money and the rates of interest may be much depreciated, not forgetting the wishes of their mother as to their education, and taking into consideration all the other circumstances of the case, their Lordships have come to the conclusion that, in order to make adequate provision for the proper maintenance, education and advancement of the appellants, there should be provided out of the residuary estate of the testator for each appellant the additional sum of £10,000, to be held by the trustees upon the same trusts in all respects as are declared by the will or by the will and second codicil of the testator (as the case may be), as such trusts are varied by the order of NICHOLAS, J., of Dec. 11, 1936.

Their Lordships are therefore of opinion, and will humbly advise His Majesty, that this appeal should be allowed, that the order of NICHOLAS, J., of Dec. 11, 1936, should be varied by directing the trustees to provide out of the testator's residuary estate the two additional sums of £10,000, to be held upon the trusts that have been indicated, and by directing that the costs of all parties of the further hearing before him of the appellants' motion should be dealt with in the same manner as were the costs of the first hearing. The costs of all parties of this appeal must be borne by the residuary estate of the testator.

Appeal allowed. The order of the Supreme Court of New South Wales to be varied by directing the trustees to provide out of the testator's residuary estate the two additional sums of £10,000, *to be held upon the trusts indicated. The costs of all parties to be borne by the residuary estate of the testator.*

Solicitors : *Elvy Robb & Co.* (for the appellants and for the respondent, Gwendoline Bosch) ; *Light & Fulton* (for the respondent, the University of Sydney).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

REFUGE ASSURANCE CO., LTD. *v.* PEARLBERG.

[CHANCERY DIVISION (Simonds, J.), **March 3, 4, 8, 9, 10, 1938.**]

Mortgage—Receiver—Appointment—By mortgagee in possession—Collateral mortgage of policy of insurance—Non-payment of premiums—Whether breach of provision in mortgage—Law of Property Act, 1925 (c. 20), *ss.* 101 (1) (*iii*), 103 (iii).

A mortgagee of several properties went into possession by R. on Oct. 23. It was intended that R. should take possession as receiver, and a letter to this effect written by the mortgagee was delivered to the mortgagor, but the deed of appointment was not executed until Nov. 11 in the same year. The loan upon one of the properties was further secured by a collateral mortgage of an insurance policy, the collateral security not being in any way referred to in the principal mortgage, but the collateral mortgage was expressed to be supplemental to the principal mortgage. In respect of this mortgage there was no default until Oct. 24, except in the failure to pay the premiums due under the policy. It was contended that the failure to pay the premiums was a breach of a provision contained in the principal mortgage deed within the Law of Property Act, 1925, s. 103 (3) :—

HELD : (i) the mortgagee, by putting R. in possession before the deed of appointment as receiver was executed, became a mortgagee in possession and accountable as such for the period from Oct. 23 to Nov. 11.

(ii) a mortgagee in possession has a statutory power to appoint a receiver by virtue of the Law of Property Act, 1925, s. 101 (1) (iii).

(iii) the failure to pay the premiums was not, in the circumstances, a breach of any provision of the principal mortgage deed.

(iv) the mortgagee was not estopped by reason of the letter stating that a receiver had been appointed on Oct. 23 from proving a valid appointment on Nov. 11.

[**EDITORIAL NOTE.** The principal matter debated here is the question whether a mortgagee in possession has a statutory power of appointing a receiver. On this point the judge has virtually followed a *dictum* of PEARSON, J., in *Tillett* v. *Nixon* (1), which was referred to without dissent by P. O. LAWRENCE, J., in *Anchor Trust Co., Ltd.* v. *Bell* (3). A The point as to the statutory powers arising upon the non-payment of premiums is of considerable importance to conveyancers and insurance companies, but it should be noted that this must to a considerable extent turn upon the precise terms of the documents.

AS TO APPOINTMENT OF RECEIVER OUT OF COURT, see HALSBURY, Hailsham Edn., Vol. 23, pp. 447-449, paras. 658, 659; and FOR CASES, see DIGEST, Vol. 35, B pp. 530, 531, Nos. 2614, 2615.]

Cases referred to:

(1) *Tillett* v. *Nixon* (1883), 25 Ch.D. 238; 35 Digest 521, *2506*; 53 L.J.Ch. 199; 49 L.T. 598.

(2) *Re Prytherch, Prytherch* v. *Williams* (1889), 42 Ch. D. 590; 35 Digest 522, C *2508*; 59 L.J.Ch. 79; 61 L.T. 799.

(3) *Anchor Trust Co., Ltd.* v. *Bell*, [1926] Ch. 805; 35 Digest 512, *2425*; 95 L.J.Ch. 564; 135 L.T. 311.

(4) *Greenwood* v. *Martins Bank, Ltd.*, [1933] A.C. 51; Digest Supp.; 101 L.J.K.B. 623; 147 L.T. 441.

(5) *Parkinson* v. *Hanbury* (1860), 1 Drew. & Sm. 143; 35 Digest 512, *2428*; D *on appeal* (1865), 2 De G. J. & Sm. 450; (1867), L.R. 2 H.L. 1.

(6) *County of Gloucester Bank* v. *Rudry Merthyr Steam & House Coal Colliery Co.*, [1895] 1 Ch. 629; 35 Digest 532, *2631*; 64 L.J.Ch. 451; 72 L.T. 375.

(7) *Heales* v. *M'Murray* (1856), 23 Beav. 401; 35 Digest 395, *1378*.

(8) *Noyes* v. *Pollock* (1886), 32 Ch.D. 53; 35 Digest 395, *1379*; 55 L.J.Ch. 513; 54 L.T. 473.

(9) *Smith* v. *Chadwick* (1882), 20 Ch.D. 27; 17 Digest 300, *1129*; 51 L.J.Ch. 597; E 46 L.T. 702; *on appeal* (1884), 9 App. Cas. 187.

(10) *Gaskell* v. *Gosling*, [1896] 1 Q.B. 669; 35 Digest 394, *1370*; 65 L.J.Q.B. 435; 74 L.T. 674; *on appeal*, [1897] A.C. 575.

(11) *Mason* v. *Westoby* (1886), 32 Ch.D. 206; 35 Digest 522, *2507*; 55 L.J.Ch. 507; 54 L.T. 526. F

ORIGINATING SUMMONS for the enforcement of certain securities held by the plaintiffs. The facts are fully set out in the judgment.

Alexander Grant, K.C., *H. S. Barker* and *Ingram Lindner* for the plaintiffs.

Hon. Sir Stafford Cripps, K.C., and *H. Burton* for the defendant. G

Grant, K.C.: It is clear that the receivership could not operate until Nov. 11, 1931. If a mortgagee does not intend to go into possession at all, he appoints, or is deemed to have appointed, a statutory receiver. The mortgagee cannot be deemed to have gone into possession, and the plaintiff company did not intend to go into possession as a mortgagee H at all. As the plaintiff company intended to appoint a statutory receiver, the postponement of the date of the execution of the deed does not alter that intention. If the court decided that the plaintiff company could legally appoint a statutory receiver, the only question which would arise would be as to whether or not the defendant was in arrears. I ask the

court to hold that either the plaintiff company was not in possession before Nov. 11, as it did not intend to go into possession as mortgagee, or, if the plaintiff company was in possession, it was only because the deed was not ready until Nov. 11. There is no doubt that the defendant was in arrears on that date, as the accounts show conclusively. [Counsel
A referred to *Parkinson* v. *Hanbury* (5), *Tillett* v. *Nixon* (1), *Re Prytherch, Prytherch* v. *Williams* (2), *County of Gloucester Bank* v. *Rudry Merthyr Steam & House Coal Colliery Co.* (6), *Anchor Trust Co., Ltd.* v. *Bell* (3).]

Cripps, K.C.: The appointment of the receiver was not validly made
B prior to Nov. 11, but the plaintiff company cannot be heard to say that the appointment was made on any date other than Oct. 23. They are estopped from bringing extrinsic evidence, in view of the fact that they have acted upon the basis of a receiver having been appointed on Oct. 23. Mr. Pearlberg has also acted upon that basis for the last six years. In
C order to raise an estoppel, there has to be a representation made to the person who is alleging the estoppel. In this case, the statement was that the receiver had been appointed on Oct. 23. The statement has to be made for the purpose of the person to whom it was made acting upon it. That was in this case its direct purpose—namely, that Mr. Pearlberg
D should cease to collect the rents and manage the property. Thirdly, it must be shown that Mr. Pearlberg acted upon it. There is no issue upon that, because he acted upon the basis that the receiver had been appointed. Lastly, it must be shown that as a result of it the defendant's position is changed, and that Mr. Pearlberg is in a worse position than that in
E which he would have been if he had known the truth at the time. In the first place, if he had known the truth at the time, he himself could have collected the rents. Secondly, he could have done what he offered to do—namely, he could have paid the interest on Oct. 25, and thereby have put it out of the power of the plaintiff company to appoint a receiver
F on Nov. 11. Having represented that there was a receiver on Oct. 23, the plaintiff company cannot now produce evidence that there was not a receiver on that date. There is the clearest evidence that Mr. Pearlberg was by this representation put into a position worse than that in which he would have been if he had known the facts. If I am right upon the
G estoppel point, the date on which the receiver was put in was Oct. 23, but on that date, so far as the Dickinson Street property was concerned, there was no power to appoint a receiver, because the interest was not two months in arrear. As regards the East Street and Mosley Street properties, the £200 which was paid generally ought to have been
H appropriated to bring the payments up to date. The alternative to the plaintiff company being mortgagees in possession is that they were trespassers. The question also arises as to whether a mortgagee in possession can appoint a statutory receiver. In the Law of Property Act, 1925, s. 109 (2), the receiver is specifically stated to be the agent of the mortgagor. The Act contains no provision that notice of the

appointment should be given. If a mortgagee in possession can appoint a statutory receiver, the responsibility of the mortgagor can be increased. The absence of any provision in the Act for notice to be given is only consistent with the view that a mortgagee in possession would continue as such. If the plaintiff company was a mortgagee in possession, my submission is that the company had to remain so until a receiver was appointed by the court, and it could not itself appoint under statutory powers. [Counsel referred to *Greenwood* v. *Martins Bank, Ltd.* (4), *Re Prytherch, Prytherch* v. *Williams* (2), *Anchor Trust Co., Ltd.* v. *Bell* (3), *Tillett* v. *Nixon* (1), *Heales* v. *M'Murray* (7), *Noyes* v. *Pollock* (8).]

Grant, K.C., in reply, referred to *Smith* v. *Chadwick* (9), *Gaskell* v. *Gosling* (10), *Parkinson* v. *Hanbury* (5), *Mason* v. *Westoby* (11), *Greenwood* v. *Martins Bank, Ltd.* (4).

Simonds, J.: In these proceedings, which are proceedings by way of originating summons for the enforcement of certain securities held by the plaintiffs, the Refuge Assurance Co., Ltd., an order was made on June 10, 1937, ordering certain accounts and inquiries; first, an account in the usual form of what is due to the plaintiffs under or by virtue of the several mortgages mentioned in the originating summons, and for costs; and, secondly, an inquiry which was necessitated by the allegation that the plaintiffs had entered into possession of the mortgaged premises as mortgagees in possession—an inquiry whether the plaintiffs had entered into possession of the hereditaments comprised in the said mortgages or any of them, and into the receipt of the rents and profits thereof or any part thereof; and then, again in the usual form, if that inquiry should be answered in the affirmative, the account which is then usually directed—namely, an account of the rents and profits received by the plaintiffs on the footing of wilful default since the plaintiffs entered into such possession.

That order having been made, and the summons to proceed having been taken out upon it, the inquiry, since it appeared to be a complicated matter, on which both sides wished to cross-examine the deponents, has been adjourned to me for determination. Upon this coming before me, it was suggested by counsel for the plaintiffs, and not dissented from by counsel for the defendant, that the form of the inquiry should be slightly altered, and, indeed, enlarged; so that before me the issue is not only as to whether the plaintiffs at any time went into possession as mortgagees of the mortgaged premises, or any part of them, but also, if they did so go into possession, as to how long they remained in possession. That form of inquiry was necessitated by the facts and the questions of law which will emerge in the course of my judgment.

The mortgages which the plaintiffs seek to enforce are three in number. In each case the mortgagor is the first defendant, Henry Hyman Pearlberg. The mortgages were these: first of all, a mortgage dated Dec. 31, 1928, the mortgaged premises being certain premises in East Street, Manchester, and the sum secured being £17,000. That mortgage I will refer to as the East Street mortgage. Secondly, a mortgage of Oct. 2, 1928, the mortgaged premises being premises in Mosley Street, Manchester, and the sum secured being £15,000. I will refer to that as the Mosley Street mortgage. That mortgage was further secured by the collateral security of a life policy upon the life of Mr. Pearlberg in the sum of £3,000, at an annual premium of £313 10*s*., the annual premium being payable upon Oct. 1 in each year. The third mortgage was dated Nov. 21, 1928, and it was upon certain premises in Dickinson Street and Upper Mosley Street, also in the city of Manchester. The sum secured was £40,000. I will refer to that mortgage as the Dickinson Street mortgage. That mortgage also was further secured by the collateral security of a life policy upon the life of Mr. Pearlberg in the sum of £6,000, at an annual premium of £621, payable on Oct. 1 in each year. The premises are subject to a second mortgage in a large sum originally created in favour of the National Bank, but now vested in the second defendant, Beatrice Pearlberg, the wife of the first defendant.

The several payments due from time to time in respect of interest upon the mortgages and the premiums upon the policies from time to time fell into arrear, and on Oct. 23, 1931, the plaintiff company, having previously given instructions for the necessary deed appointing a receiver of the mortgaged premises to be prepared, put a Mr. Roberts into possession of the mortgaged premises, purporting and intending so to put him in as a receiver under the statutory powers in that behalf contained in the Law of Property Act. A deed was prepared, and it bears date Oct. 23, 1931. It contains recitals that the interest upon the several mortgages was two months in arrear, and it contains recitals that the premiums payable upon the several policies had not been paid in accordance with the covenants by the mortgagor in that behalf.

The fact is, and I find it as a fact without regard to the point of estoppel, that the deed, which has been produced, and bears date Oct. 23, 1931, was not in fact signed, sealed and delivered on that date, and, accordingly, when the mortgagees put Mr. Roberts into possession, there had been no deed validly executed appointing Mr. Roberts receiver. That I find as a fact. I find further as a fact that on Nov. 11—that is to say, some nineteen days later—the deed which bears date Oct. 23 was in fact signed, sealed and delivered, and as from that day beyond all question there was an effective appointment of Mr. Roberts as receiver of the mortgaged premises. That, as will presently appear, may give rise to a number of interesting and difficult questions of law, but before I come to them I want to examine the facts as I find them on Oct. 23, the facts in relation to the interest in respect of the several mortgages, and the facts in regard to the premiums due upon the several policies.

First, in regard to the East Street and Mosley Street properties—I can take them together—the fact is clear that the interest in respect of those two mortgages was in arrear for more than two months, so that the statutory power of appointing a receiver had then arisen, unless the defendant could succeed in the contention, elaborately and strenuously argued before me, that at that date there were moneys in the hands of an agent for the plaintiff company which were applicable, and must be deemed at that date to have been applied, in satisfaction of the interest due in respect of those mortgages. That contention, so put forward on behalf of the defendant, was a contention based in substance upon the fact that a Mr. Harper had in his hands moneys adequate to satisfy the mortgage interest in arrear, that he had those moneys in his hands as the agent of the plaintiff company, the mortgagees, and that, accordingly, he must be deemed to have applied them in satisfaction of that mortgage interest, so that it was not in arrear. That fact which the defendants sought to establish, and, indeed, the fact which it lay upon them to establish, in my judgment they wholly fail to establish. It was for them to show, if they could, that Mr. Harper was the agent of the plaintiff company to receive and to apply these moneys in the way that I have said. They fell far short of doing so. The evidence before me was conclusive that Mr. Harper was not employed by the plaintiff company to receive and to apply these moneys. Mr. Green, who was the solicitor for the plaintiff company, told me that Mr. Harper was not so employed by the plaintiff company. Mr. Harper himself told me that he was not so employed by the plaintiff company. The whole case of the defendants rests upon the suggestion that, from the facts, I must somehow infer that the Refuge Company had held out Mr. Harper as their agent to receive these moneys, and that he must be deemed to have been such agent. I find also as a fact that, in regard to the interest upon the East Street and the Mosley Street mortgages, the interest was, on Oct. 23, two months in arrear, and that in regard to those properties, therefore, the statutory power of appointing a receiver had arisen. The position in regard to the Dickinson Street property is different. There the position was this. The interest in arrear on Oct. 23, 1931, was interest which was payable on Aug. 23. Therefore, on Oct. 23 the position was that the interest was not in arrear until midnight on Oct. 23. That was conceded by counsel for the plaintiffs, the mortgagees. Accordingly, on Oct. 23, when the receiver was put into possession of the mortgaged premises comprised in the third mortgage, interest was not in arrear for the statutory period, and, accordingly, the right to appoint a receiver had not arisen, unless this further contention was well-founded in respect of that mortgage, that the right had arisen by reason of the non-payment of the premium due upon the life policy which had been assigned as collateral security for the Dickinson Street property.

It will be convenient, I think, to turn to that point now, and to get rid of it. It rests upon this. The Law of Property Act, 1925, s. 103, provides that " a mortgagee shall not exercise the power of sale conferred by this Act unless and until " the non-payment after notice of the mortgage money, that is, the principal (subsect. (i)) ; the non-payment for the statutory period of interest due under the mortgage (subsect. (ii)). Subsect. (iii), the one I have to consider, is in these terms :

> There has been a breach of some provision contained in the mortgage deed or in this Act, or in an enactment replaced by this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

The argument upon that is this. The Dickinson Street mortgage is dated Nov. 21, 1928. It is a mortgage which contains no reference whatever to the life policy which is to be the subject of the collateral security. The assignment by way of collateral security of the policy is dated the same date, Nov. 21, 1928. It is an assignment which is expressed to be supplemental to the Dickinson Street mortgage, which is called the principal deed, and it recites that :

> upon the treaty for the principal deed it was agreed that the repayment of such sum of £40,000 and interest thereon as therein mentioned shall be further secured in manner hereinafter appearing. . . .

By its operative part it witnesses that the borrower assigns the policy of insurance subject to the proviso for redemption thereinafter contained. There is the usual proviso for redemption ; there is the covenant for payment, the covenant that during the continuance of the security the borrower will pay whatever sum may be necessary for keeping on foot each and every policy or policies for the time being subject to this security. Then there is this proviso :

> Provided always and it is hereby agreed that under the statutory power of sale the said policy hereby assigned or any new policy or policies as aforesaid may be sold or surrendered to the lenders or to any other person or persons corporation or corporations company or companies and that notwithstanding anything contained in these presents or in the Act of Parliament giving such statutory power of sale such power may be exercised without any notice to the borrower requiring payment of the mortgage money at any time after the borrower has become bankrupt or compounded with his creditors under the present Bankruptcy Act or any Parliamentary modification thereof or substitution for the same or after any moneys or interest payable under these presents or the principal deed. . . .

It is certain that on Oct. 23 the mortgagor had made default in the payment of the premium which was payable under this assignment. He had failed to comply with his obligations under this deed, and the argument is that, for the purpose of ascertaining whether there has been a breach of some provision contained in the mortgage deed so as to raise a power of sale of the Dickinson Street premises, I am to construe as one deed the Dickinson Street mortgage and the deed of assignment of this policy. That, I think, is a question of some difficulty, but on the whole I have come to the conclusion that I ought not to construe the two deeds as one mortgage deed, so that a failure by the mortgagor to comply with his obligation on the assignment of the policy gives rise to a right to sell the premises comprised in the Dickinson Street mortgage. No authority directly in point was produced, and it appears to me that, if the mortgagee contends that his right of sale and the consequent right of appointing a receiver of the premises comprised in the one deed should arise from the failure of the mortgagor to comply with his obligations under the other deed, that is a matter which should be defined and expressed in the deed itself, and I should not, I think, be left to construe the words " a mortgage deed " in the subsection under review as comprising two several deeds, each of which contains provisions which are deemed by the parties adequate and suitable for the different securities comprised in the different deeds.

While I am dealing with this deed, I should dispose also of another point which has been raised, a point which suggests that the power of sale of the premises comprised in the Dickinson Street mortgage arises by virtue of the proviso which I have just read in the deed of assignment of the policy, so that the power of sale of the Dickinson Street property arises in the event of the interest being in arrear, not, as prescribed by the statute, for two months, but for one month only. That argument, which, as it was conceded, was an ingenious one, but, as I agree, not necessarily the worse for being ingenious, was one which, upon the construction of this deed, I cannot adopt. I do not think that, upon the true construction of the deed of assignment, the proviso can operate so as to narrow the period within which interest must be in arrear upon the principal deed before the statutory power of sale and of appointing a receiver arises. In the result, therefore, I must come to the conclusion that, while in regard to East Street and Mosley Street the statutory power of appointing a receiver had arisen, in regard to Dickinson Street it had not arisen, and did not arise until Oct. 24.

There is one fact that I should state before I further follow the argument. Between Oct. 23 and Nov. 11, Mr. Roberts, the purported receiver, being then in possession, the defendant, Mr. Pearlberg, interviewed Mr. Green, the solicitor for the Refuge Company, and, as he says, made an offer for payment of the interest then due. He was told by Mr. Green, and *bona fide* believed, that the receiver was lawfully in, and that that offer would not be accepted. The Refuge were perhaps tired of Mr. Pearlberg as a mortgagor, and they wanted their principal and interest discharged. That matter was not further pressed. No tender was made of the amount due, and Sir Stafford Cripps, on behalf of the defendants, frankly said that he did not think that it carried the matter any further.

On Nov. 11, as I have said, the deed appointing Mr. Roberts was duly signed, sealed and delivered. As at that date, there is no doubt that, in respect of all the properties, the power of sale and of appointing a receiver had arisen, and, accordingly, that, but for the fact to which I shall next refer, this was the position. No receiver had in fact been appointed until Nov. 11, but by Mr. Roberts, whom I must regard therefore as their agent in this behalf, the plaintiffs as mortgagees had gone into possession of the mortgaged premises. It is clear that their acts were not merely notices to the tenants and receipts of the rents and profits, so far as, during that period, they were payable. They were acts which resulted in the control and management of the property being taken from the mortgagor. That leads to this very curious situation. This court has always been reluctant to treat a mortgagee as mortgagee in possession. It assumes that a mortgagee does not lightly take upon himself a burden which is extremely onerous—onerous for this reason, that he is liable to account on the footing of wilful default for the period during which he is in possession. Accordingly, the court has been even astute to find that a mortgagee not intending to take possession as mortgagee has not in fact been in possession in that character, and, if it is possible, will ascribe his position to any other legal category which is possible. In this case, however, Mr. Grant frankly opened the case to me that he must submit to a finding that, for the period from Oct. 23 to Nov. 11 he was in as mortgagee in possession. I was inclined to ask him to reconsider that admission, and he did so, but in the end it really came to this result, that, it being impossible to ascribe to the plaintiff company a possession as trespasser, nothing was open to the court except to come to the conclusion that, though they did not intend it, they were mortgagees in possession during the period under review. Accordingly, I find that they were mortgagees in possession of the mortgaged premises from Oct. 23 until Nov. 11.

Then arises a nice question of law: being mortgagees in possession, could they, notwithstanding that fact, appoint a receiver of the mortgaged premises on Nov. 11? That is a matter upon which there is some, but perhaps I may say all too little, authority. Before I examine the authorities, I must observe that the question is purely one of construction of the Law of Property Act, 1925. The statutory power given to a mortgagee to appoint a receiver is contained in the Law of Property Act, 1925, s. 101 (1) (iii), which gives a mortgagee, where the mortgage is made by deed, the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further: first, a power when the mortgage money has become due to sell; second, a power at any time after the date of the mortgage deed to insure; third, a power when the mortgage money has become due to appoint a receiver of the income of the mortgaged property, or any part thereof; fourth, a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting. Therefore, I have this. I find under the statute four several powers given to a mortgagee. In the case of three of those powers there is no limit, there is no qualification, as to whether or not the mortgagee is in possession. As to the fourth, I think that there is an express limitation. It is a power exercisable only while the mortgagee is in possession to cut and sell timber.

Merely as a matter of construction of the statute, it appears to me that I should be driven to the conclusion that this power, which is unlimited in its terms, is exercisable by a mortgagee whether or not he is in possession. That is the conclusion to which I should come unaided by any authority. It is necessary, however, just to glance at the authorities.

There are three to which I must refer. First of all, *Tillett* v. *Nixon* (1). In that case, a legal mortgagee, being in possession of the mortgaged property, applied to the court for the appointment of a receiver. Let me pause there to observe that it is not, therefore, a direct authority for the proposition which I have to consider, for there the question was of the right of a mortgagee to go to the court and ask the court to appoint a receiver. The question of his own statutory power to appoint a receiver did not expressly arise. In the course of his judgment, PEARSON, J., says, at p. 239:

> I have always thought it a very hard case that a legal mortgagee under the old law had no right to come to the court and ask for a receiver of the mortgaged property. Now, however, under the Judicature Act the court is authorised to appoint one, where it could not previously have done so.

Then come these words:

> I have no doubt the mortgagee might appoint a receiver under the Conveyancing Act without coming to the court, but when an action for foreclosure is pending, and the parties are at arm's length, it is much more desirable that the receiver should be appointed by the court.

That is not an authority, but a *dictum*, by a judge very learned in real property law, that a mortgagee (he means there a mortgagee in possession) might appoint a receiver under the Conveyancing Act. It is to be observed that the terms of the Conveyancing Act are in this respect identical with those of the Law of Property Act, 1925. So much for *Tillett* v. *Nixon* (1).

The next case is *Re Prytherch, Prytherch* v. *Williams* (2). In that case, where, again, the precise point which I have to determine was not before the court, NORTH, J., had to consider the application of a mortgagee in possession for the appointment of a receiver, and what he said was this. After dealing with the facts showing that the mortgagee had been mortgagee in possession for a number of years, he said, at pp. 599, 600:

> Now it is proposed that he should be allowed to give up possession, and that a receiver should be appointed. As regards giving up possession, I am not aware that a mortgagee, who has exercised his right of taking possession of the mortgaged property, has any right to give up that possession whenever he likes. He may take possession whenever he pleases, and if, when he has elected to take possession he may give it up again, it is clear that he may take possession again, and, then, if the contention is well founded, he may give it up again. I have never heard it suggested, nor do I think it is the law, that a mortgagee is entitled to go into and out of possession whenever he likes. In my opinion, when he once takes upon himself the burden which is imposed on all mortgagees who are in possession, he must continue to perform the duty, and he cannot when he pleases elect to give it up. I am satisfied that, if there were any such right, some authority to that effect would have been produced. None, however, has been cited to me, nor have I been able to find such authority referred to in any of the textbooks which I have looked at myself.

That is what NORTH, J., had to say about a mortgagee in possession going out of possession, and the argument is that, if a mortgagee in possession cannot go out of possession, so also he cannot appoint a receiver, which in effect gets rid of his liability and throws it back upon the mortgagor, since the receiver is deemed to be the agent of the mortgagor. It is to be observed that NORTH, J., though indeed *Tillett* v. *Nixon* (1) appears to have been cited in argument, does not deal expressly with the observations of PEARSON, J. It is clear, however, that those two judges were in direct conflict upon this point.

In that state of the law in 1926, the case of *Anchor Trust Co., Ltd.* v. *Bell* (3) came before P. O. LAWRENCE, J. There again, the exact point which I have to determine was not before the court, for the issue there was complicated by a consideration of the Courts (Emergency Powers) Act, which, perhaps fortunately, is no longer in operation to perplex and confuse. In that case, the judge had expressly to consider what was the position of a mortgagee in possession, and he says, at p. 817 :

> A point was taken on behalf of the defendants that, having once entered into possession, Mrs. Bell could not at her own pleasure go out of possession again, and that the appointment of Mr. Martin as receiver was therefore invalid and nugatory, and that she in fact remained a mortgagee in possession up to the time when she purported to sell. In support of this contention *Re Prytherch, Prytherch* v. *Williams* (2) was cited. In that case NORTH, J., held that a mortgagee, once having gone into possession, had no right to give up that possession at pleasure. The plaintiffs, in answer to this contention, referred to the case of *Tillett* v. *Nixon* (1), where PEARSON, J., stated that he had no doubt that a mortgagee in possession might appoint a receiver under the Conveyancing Act. In view of the unrestricted power conferred by the Conveyancing Act, 1881, s. 19 (2), I respectfully concur in the opinion expressed by PEARSON, J. In *Re Prytherch, Prytherch* v. *Williams* (2), NORTH, J., was not considering the power of a mortgagee in possession to appoint a receiver under the Conveyancing Act, 1881, but was dealing with the question of a mortgagee in possession desiring to give up that possession by procuring the court to appoint a receiver.

Therefore I have this, that a judge as short a time ago as 1926, having before him these two cases, and having carefully considered and weighed the opinions of his predecessors, came to the conclusion that a mortgagee in possession has s statutory power to appoint a receiver.

I think, whatever my own view was on the matter, that I should be bound to follow and adopt the judgment of P. O. LAWRENCE, J., in that case, and I do so the more willingly because, upon my own view of the construction of the Act of Parliament, it would not be right to limit the power of a mortgagee, which, according to the terms of the Act, is unqualified, so that that power could be exercisable only so long as he did not go into possession. Accordingly, the position, as I see it, is that the mortgagees here were in possession until Nov. 11, when they executed a proper deed appointing a receiver, and that as from that date they were no longer in possession, but that the possession was the possession of the receiver as agent for the mortgagor.

So far, the case, though somewhat complicated, and raising, no doubt, questions of some difficulty, is comparatively plain sailing. It is complicated now by this point with which I must deal. Counsel for the defendant, the mortgagor, makes this point. He says that on Oct. 23, by letter of that date, the mortgagee through his solicitor informed the mortgagor that a receiver of the mortgaged premises had that day been appointed. He goes on to say that therefore the plaintiffs are estopped from denying the truth of that statement upon which the defendant has acted to his detriment, and that, therefore, not only was the receiver appointed on Oct. 23, 1931—or at least the plaintiffs cannot be heard to say the contrary—but also the plaintiffs cannot allege and prove that on Nov. 11, 1931, a receiver was validly appointed by a deed signed, sealed and executed on that day. I am bound to say that that appears to me to be a complete *non sequitur*. It may be—although upon that I shall presently have something to say—that the plaintiff is estopped from asserting that on Oct. 23 there was not a receiver validly appointed. If that is so, I fail to see why the plaintiff should be put into a position worse than that in which he would otherwise be, and be precluded from asserting that which is the fact—namely, that on Nov. 11 there was a receiver validly appointed by deed of that date. If that is so, of course the result is extremely unsatisfactory to the defendant, for the result of that would be, if I allow both to operate, but only to a limited extent, that the receiver must be regarded as validly appointed of the East Street and Mosley Street properties as from Oct. 23, for, according to the defendant's own argument, it is at that date that the receivership must be held to operate, and it would be only in respect of the Dickinson Street property that, even for the limited period, there was no receiver validly appointed, because, as at Oct. 23, no receiver could be validly appointed. I do not think it right, however, since I cannot give effect to the whole of the argument upon this estoppel point, that it should be used against the defendant who puts it forward to a limited extent which would act to his disadvantage. I want, however, to add this upon the estoppel point. The rules of estoppel are clearly enough laid down, and particularly, perhaps, in the recent case of *Greenwood* v. *Martins Bank, Ltd.* (4), to which I was referred. In relation to what Lord Tomlin said in that case, I think it right to make this observation. It is clear that the statement, made by the plaintiff company to Mr. Pearlberg, that they had appointed a receiver was not a statement made in pursuance of any duty owed by the mortgagee to the mortgagor, for there is no obligation to give notice of the appointment of a receiver. It was not a statement made with a view to inducing any particular course of conduct, and, in particular, it was not a statement made with a view to inducing Mr. Pearlberg to pay, or not to pay, the interest or other moneys due in respect of the mortgaged premises. I am far from satisfied by the evidence of Mr. Pearlberg, to whose evidence I can give little credence, that he was by that induced to do, or to abstain from doing, anything at all. The view which he took of the appointment of the receiver may be seen from the fact that very shortly thereafter he challenged the validity of the appointment, and in a variety of proceedings attempted to assert his rights. In any view, therefore, I should not be disposed to give effect to the estoppel plea, but, holding as I do, and allowing it to operate to the utmost extent to which it can operate, nevertheless it would not preclude the plaintiffs from alleging, and from proving by proper evidence, that a receiver was duly appointed on Nov. 11, 1931. It would not, therefore, be right to allow any operation to it at all.

Accordingly, the result is that, as from Oct. 23 to Nov. 11, the plaintiffs were mortgagees in possession, and must account on that basis. On Nov. 11 they ceased to be mortgagees in possession, and the possession was that of Mr. Roberts, the receiver, as agent for the mortgagor, and as from that date the account will be taken on that basis.

Solicitors: *W. P. Green*, (for the plaintiffs); *Rees M. Rees*, (for the defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

JOHNSTONE *v.* BERNARD JONES PUBLICATIONS, LTD.

[CHANCERY DIVISION (Morton, J.), **March 3, 4, 7, 8, 9, 1938.**]

Copyright—"Fair dealing with any work for the purposes of criticism"—Football pools—Mathematical tables published in copyright works—Reproduction of one of the tables in a letter written to defendants—Publication by defendants of the letter and its contents—Copyright Act, 1911 (c. 46), *ss.* 1 (2), 2 (1) (i).

The plaintiff was the author, and owner of the copyright, of two original literary works, one published in May, 1934, called "A Summary of some Systems and Tables in dealing with Three Alternative Possibilities or Results applied to Crosswords, Pictures and Pools," the other published in 1935, called SYSTEMATIC FOOTBALL BETTING. A material part of each work consisted of certain mathematical tables by the use of which an entrant for football pools was enabled to arrange his entries in what was thought to be an advantageous manner. The defendants, the publishers of a weekly paper known as THE FOOTBALL FORECAST, published in the issue of that paper for Dec. 1, 1936, a letter which contained a table headed "Reduced Permutation Table," which was in substance a reproduction of a table which appeared in each of the plaintiff's two books. The plaintiff contended that the publication and printing of that letter were infringements of his copyright. The defendants denied that the table was a substantial part of the plaintiff's books within the meaning of the Copyright Act, 1911, s. 1 (2), or that the table complained of was copied therefrom. They contended that it was an independent compilation, and that what was contained in the issue of their paper was a fair dealing with the plaintiff's work for the purposes of criticism or review within the proviso to the Copyright Act, 1911, s. 2 (1):—

HELD: (i) the letter amounted to a publication by the defendants of a substantial part of the plaintiff's books. The table, although small in bulk, was a substantial part of each book.

(ii) the letter as it stood, being in the form of a criticism, was not an infringement of the plaintiff's copyright, as it was not published with any motive of taking an unfair advantage of the plaintiff's work. It was a fair dealing with the work for the purposes of criticism within the proviso to the Copyright Act, 1911, s. 2 (1), although the table was not attributed to the author.

(iii) on the facts, the table in the letter was an independent compilation.

[EDITORIAL NOTE. The principal question at issue in the present case was whether or not the defendants were actuated by an oblique motive in publishing the letter complained of. This question resolves itself into whether the letter was published in the course of a fair criticism of the plaintiff's work or for the purpose of taking an unfair advantage of that work. In general, the motive of the infringer is immaterial, but the proviso to the Copyright Act, 1911, s. 2 (1), makes an exception of any fair dealing for the purposes of, *inter alia*, criticism or review.

As to Fair Criticism or Review, see HALSBURY, Hailsham Edn., Vol. 7, p. 578, para. 895 ; and for Cases, see DIGEST, Vol. 13, pp. 206, 207, Nos. 410-417.]

Cases referred to :

(1) *Hawkes & Son (London), Ltd.* v. *Paramount Film Service, Ltd.*, [1934] Ch. 593 ; Digest Supp. ; 103 L.J.Ch. 281 ; 151 L.T. 294. A

(2) *Bramwell* v. *Halcomb* (1836), 3 My. & Cr. 737 ; 13 Digest 205, *406*.

(3) *Saunders* v. *Smith* (1838), 3 My. & Cr. 711 ; 13 Digest 223, *615* ; 7 L.J.Ch. 227.

(4) *Elderton* v. *United Kingdom Totalisator Co., Ltd.*, [1935] Ch. 373 ; Digest Supp. ; 104 L.J.Ch. 105 ; 152 L.T. 549.

(5) *Ash* v. *Dickie*, [1936] Ch. 655 ; [1936] 2 All E.R. 71 ; Digest Supp. ; 105 L.J.Ch. 337 ; 154 L.T. 641. B

(6) *Bradbury* v. *Hotten* (1872), L.R. 8 Exch. 1 ; 13 Digest 207, *418* ; 42 L.J.Ex. 28 ; 27 L.T. 450.

(7) *Ash* v. *Hutchinson & Co. (Publishers), Ltd.*, [1936] Ch. 489 ; [1936] 2 All E.R. 1496 ; Digest Supp. ; 155 L.T. 46.

(8) *Cescinsky* v. *Routledge (George) & Sons, Ltd.*, [1916] 2 K.B. 325 ; 13 Digest 217, *538* ; 85 L.J.K.B. 1504 ; 115 L.T. 191. C

(9) *British Oxygen Co.* v. *Liquid Air, Ltd.*, [1925] Ch. 383 ; Digest Supp. ; 95 L.J.Ch. 81 ; 133 L.T. 282.

(10) *Smith* v. *Chatto* (1874), 31 L.T. 775 ; 13 Digest 207, *417*.

(11) *Dodsley* v. *Kinnersley* (1761), Amb. 403 ; 13 Digest 206, *409*.

(12) *Cary* v. *Kearsley* (1802), 4 Esp. 168 ; 13 Digest 205, *404*.

(13) *Whittingham* v. *Wooler* (1817), 2 Swan. 428 ; 13 Digest 206, *410*. D

Action by the plaintiff for damages for alleged infringement of copyright and conversion of a table published in literary works the copyright of the plaintiff, and for delivery to him of all copies of the infringing table.

The Copyright Act, 1911, ss. 1 (2), 2 (1) (i), provides as follows : E

> 1 (2). For the purposes of this Act, " copyright " means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public. . . .
>
> 2 (1). Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright : Provided that the following acts shall not constitute an infringement of copyright : (i) any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary. F

Rudolph Moritz, K.C., and *G. H. Lloyd-Jacob* for the plaintiff.

H. C. Leon and *C. H. C. Haslam* for the defendants. G

Moritz, K.C. : The very essence of criticism here is that it should be, and should purport to be, a criticism of the plaintiff's work. It ceases to be fair dealing by way of criticism if ascribed to someone else. Here " R. I. H.," the writer of the letter, had never heard of the plaintiff or his work. He purports to give a criticism of a permutation table, but H not that of the plaintiff. [Counsel referred to *Elderton* v. *United Kingdom Totalisator Co., Ltd.* (4), *Ash* v. *Dickie* (5), *Bradbury* v. *Hotten* (6).]

Leon : No actual damage to the plaintiff has been proved, and there is no probability of it. Systems for entering football-pool competitions are matters of public interest, and people who produce them must expect to find them criticised. There was no desire here to exploit the plaintiff's work for the benefit of the defendants. The intention of the writer of the letter was to criticise. We have here taken something, but not a substantial part. The table is valueless without the letterpress, the space occupied by it is small, the evidence shows that other people could work A it out, and it is not a particularly useful table. This is a case which clearly comes within the proviso. [Counsel referred to *Ash* v. *Hutchinson & Co.* (*Publishers*), *Ltd.* (7), *Cescinsky* v. *George Routledge & Sons, Ltd.* (8), *British Oxygen Co.* v. *Liquid Air, Ltd.* (9), *Smith* v. *Chatto* (10), *Dodsley* v. *Kinnersley* (11), *Cary* v. *Kearsley* (12), *Whittingham* v. *Wooler* (13).]

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MORTON, J.: The plaintiff in this case, Ernest Leo Johnstone, is a journalist, and his special line of journalism is devising systems whereby his readers may be assisted in winning money in football pools. The first defendants, Bernard Jones Publications, Ltd., are the publishers of a C weekly paper known as THE FOOTBALL FORECAST, which is devoted partly to foretelling the results of football matches and partly, and to a very large extent, to endeavouring to assist its readers in winning money by entering football pools. The second defendant, Miss Kathleen May Beauchamp, trading as the Farleigh Press, is the printer of the paper D known as THE FOOTBALL FORECAST.

The following facts are admitted or proved in the action. The plaintiff is the author of two original literary works, one of which was published in May, 1934, and it is called " A Summary of some Systems and Tables in dealing with Three Alternative Possibilities or Results applied to Cross-E words, Pictures and Pools." The second of these works is called SYSTEMATIC FOOTBALL BETTING. It is a booklet containing 128 pages, and it was published in 1935. It is not now disputed that the plaintiff is, and has at all material times been, the owner of the copyright in these two booklets. A material part of each booklet is certain mathematical F tables by the use of which an entrant for football pools is enabled to arrange his entries in what is thought to be an advantageous manner. The two literary works in question have had quite a wide circulation, and the plaintiff, in addition to having written those booklets, is a regular contributor to a publication known as THE RACING AND FOOTBALL G OUTLOOK. He has published many articles in that paper in regard to his systems, and these articles, I have no doubt, caused very general interest amongst persons who enter for football pools. On p. 24 of the issue of THE FOOTBALL FORECAST for Dec. 1, 1936, a letter was published headed THOSE PENNY POOL TABLES AGAIN, and it purported to be signed by H " R. I. H. (Birmingham)." It is the publication and printing of that letter which is said to be an infringement of the plaintiff's copyright. It is said, and it is clearly established, that a table appearing in that letter and headed REDUCED PERMUTATION TABLE is in substance a reproduction of a table which appeared in each of the plaintiff's two booklets. It is in the first booklet Table 1, at p. 8, and in the second booklet Table 17, at p. 29. The exact marking is not identical in the three tables. In the plaintiff's first booklet a win by the home team is denoted by the figure "1," a win by the away team is denoted by the figure "2," and a draw is denoted by a cross. In Table 17 in the plaintiff's second booklet, the letters A, B and C are used, and they denote: A, the result which the entrant thinks the most likely result; B, that which he thinks the second most likely result; and C, that which he thinks the most improbable result of the three, there being obviously three possible results of any football match. In the table appearing in the alleged infringement, the figure "1" represents that result which the entrant thinks most likely, the figure "2" that which the entrant thinks next most likely, and the figure "3" that which he thinks the most unlikely. However, it is quite clear that in principle and in substance the three tables are the same.

The defendants raise these defences. In the first place, they say that Table 17 is not a substantial part of the plaintiff's second booklet, and that Table 1 is not a substantial part of the plaintiff's first booklet, within the meaning of the Copyright Act, 1911, s. 1 (2), which refers to "the right to publish the work or any substantial part thereof." The defendants further open the case that the table complained of was not copied, but was an independent compilation. Thirdly, the defendants say that what was done in the case of the issue of THE FOOTBALL FORECAST of Dec. 1, 1936, was a fair dealing with the plaintiff's work for the purposes of criticism or review within the proviso to the Copyright Act, 1911, s. 2 (1). The defendants also say that the plaintiff has suffered, and will suffer, no damage by reason of the act complained of. The issues which I have to determine, therefore, are: (i) is Table 1 a substantial part of the first booklet, or is Table 17 a substantial part of the second booklet, (ii) if so, is the table complained of a copy of the tables in question or an independent compilation, and (iii) if both of those questions are answered Yes, is what the defendants have done a fair dealing? I pause here to say that, in my view, the proviso to sect. 2 (1) affords an additional protection to the defendants in copyright actions in the case of the acts specified in that proviso. Even if a defendant's act would have been an infringement apart from the proviso, he is protected, in my view, by the proviso if his conduct comes within the terms of the proviso. To give an instance, if a defendant publishes a substantial part of the plaintiff's work, but such publication is a fair dealing with such work "for the purposes of private study, research, criticism, review, or newspaper summary," the defendant is protected by the proviso. I think that this was the view taken by the Court of Appeal in *Hawkes & Son (London), Ltd.* v. *Paramount Film Service, Ltd.* (1). In that case, the court took the view that the defendants had reproduced a substantial part of the plaintiffs' work, but went on to consider whether or not the proviso applied. It seems to me that this consideration would have been unnecessary if the mere fact that a substantial part had been

taken rendered it impossible to bring the proviso into operation. I may add, however, that the substantiality of the part reproduced is, in my view, an element which the court will take into consideration in arriving at a conclusion as to whether or not what has been done is a fair dealing. To take an example, if a defendant published long and
A important extracts from a plaintiff's work, and added to those extracts some somewhat sketchy criticisms upon them, I think that the court would be very ready to arrive at the conclusion that that was not a fair dealing within the section. No doubt there are many cases near the borderline, and the line may not be easy to draw in the particular case,
B nor have I found it at all easy to draw in the case now before me.

For simplicity, I shall refer to Table 17 without in each case repeating the fact that it also appears as Table 1 in the plaintiff's first booklet. Table 17 is a suggestion for enabling entrants for football pools to enter with prospects of good results. It is what is called a four-match table,
C and it is obvious that, when four matches are played, there being three possible results to each match, there are 81 possible permutations of the results. Table 17 is a most ingenious table, showing how it is possible to send in nine entries, and so to arrange the entries that at least one of the nine entries is wrong in no more than one match. Of course, one of
D the nine entries may be wholly correct in each match. The result is that, for an expenditure of 4*s*. 6*d*. in a pool such as I have described, the entrant is quite sure that he will have an entry, if it were a four-match pool, which contains not more than one error. The table gives that guarantee, and for convenience I shall refer to the guarantee given by that table
E as "the guarantee." I take the view on the evidence that Table 17 was an original and important part of the plaintiff's book. I think that it would have been a matter of great difficulty for anyone else to have arrived at such a result if he started off with his own unaided efforts and tried to produce a table which would give the guarantee, and I am satisfied
F that the table involved a great deal of research, care and originality on the part of the plaintiff.

I now come to the history of the events leading up to the action. There were several incidents, as Mr. Moritz has called them, before the incident which is the subject of the present action. On Nov. 13, 1935,
G there appeared an article in THE FOOTBALL FORECAST signed, I think, "Accountant," and there appeared in that article a table of which complaint was made by the plaintiff. In the letter the plaintiff, who signed himself by his pen name, "Mathematician," drew the attention of the defendant company, and also of another company or firm called
H Hother Periodicals, to the fact that the table appearing in the article which I have mentioned was a reproduction without material alteration of a table of which the plaintiff was the inventor and first publisher, and the plaintiff said that he was prepared to show that the writer could not have reached the combinations he gave except by substituting different letters in the plaintiff's tables. He asked the companies in question to

inform him in writing that they would allow no further reproduction of the tables, which were his copyright, and he threatened legal proceedings if that was refused. The end of that incident was a very proper letter by Mr. Bernard Jones, the managing director of the defendant company, in which he thanked the plaintiff for having drawn his attention to the matter. He went on to say:

> The article to which you take exception was offered to us in the ordinary way by an outside contributor, and my editor had no reason to suppose that it was not a perfectly original and independent effort. Following on your letters, I wrote to my contributor asking him if he could provide me with information, but up to the present I have not received a reply. In the circumstances, I can only state that it is not my intention to publish further tables which might appear to have been derived from your book the contents of which were quite unknown to me until you kindly sent me a copy. I am sure you will hardly need my assurance that, as an editor and publisher of many years' standing, it is not part of my wish or intention to publish matter which infringes anybody's copyright.

Then the plaintiff accepted that explanation, and there the matter closed. The second incident was in connection with the issue of The Football Forecast of Jan. 1, 1936. In that issue there appeared a letter signed "A. C. Healey," which contained a table, and the plaintiff on Jan. 6, 1936, wrote to Mr. Healey pointing out that the table was his own copyright and asking for an apology, failing which a solicitor would be instructed by the plaintiff. The plaintiff also wrote to the defendant company and complained of this article. The plaintiff said:

> It is impossible for me to continue to look lightly on repeated infringements of my copyrights and I must now ask you for the full address of the writer, or that you forward to him the enclosed letter, for which postage is enclosed. I must also ask that you publish the attached acknowledgment in your next issue.

This was done after an interview with the managing director, Mr. Jones, and an acknowledgment was published in the following terms:

> It has been brought to our knowledge that a table included in a letter from A. C. Healey of Gorton, and published in The Football Forecast, Jan. 1, which that gentleman claimed to have devised, is actually the reproduction of a table and method for entering pools, the copyright of which belongs to "Mathematician," Systematic Football Betting. This method is given as Table 90.

Table 90 appears at p. 115 of the booklet Systematic Football Betting, and what I may describe as the top left-hand portion of that table is, in fact, Table 17. That is, taking the first four matches of the table and the first nine entries of the table, one would find Table 17. The third incident was that on Feb. 26, 1936, the managing director of the defendant company wrote to the plaintiff as follows:

> Dear Sir, We have been asked to enter into an arrangement with the author of a copyright booklet entitled "Making Football Pay" or "Comber's New Handbook of Football Combinations." We understand that this booklet has been advertised in a number of papers, including your own, but mindful of our correspondence and conversation, I am raising the matter with you in a friendly way and should like to be assured that you make no suggestion that this little book infringes your own copyright. As a matter of fact, I believe it was published before yours, but at the moment I am without exact information. I should be obliged if you would send me a brief word in reply.

In answer, the plaintiff wrote:

> With reference to your letter of Feb. 26 I can only add to my previous remarks

> that if any of my reduction tables are published in any form I will be forced to have the matter finally settled by taking legal action. In dating the copyright of my tables by the publication of SYSTEMATIC FOOTBALL BETTING you are overlooking the fact that they were published very much earlier in pamphlets and booklets for the purpose of conforming to the copyright law. (You will understand that my copyrights are not affected by any action taken by THE RACING AND FOOTBALL OUTLOOK without my knowledge, or before I began to write for that paper.)

A Then the fourth incident was in Apr., 1936, when the then editor of THE FOOTBALL FORECAST, a Mr. Relph, wrote to the plaintiff and asked whether he had any objection to the publication of a particular letter. The plaintiff wrote back and said that in that particular instance he had no objection to the publication of the letter : B

> provided this permission is not taken as waiving any rights I possess, and only applies to the publication in the issue referred to.

What I shall call the fifth incident, although the beginning of the incident leading up to the present action occurred prior to this, was the publication in the issue of THE FOOTBALL FORECAST of Nov. 17, 1936, of a letter C signed "J. C. (Kelly)," which contained a large table. This table was an exact reproduction of Table 91 at p. 117 of the plaintiff's booklet, and, not unnaturally, the plaintiff at once complained. I should also add this. I think I am right in saying that the top left-hand corner in Table 91 was again a reproduction of Table 17. D This being a reproduction of a large table, the plaintiff did not write any letter before issuing a writ. On Nov. 23, 1936, the plaintiff issued a writ against the present defendant company and the Farleigh Press, sued as a firm, and notice of motion was also issued for an injunction. On Dec. 1, 1936, the defendants' E solicitors wrote a long letter to the plaintiff's solicitors, which I need not read at length, but they expressed their very sincere regret for what they admitted to be an infringement, and they gave an explanation of how the matter came to be published. They said in the third paragraph :

> F The publishers have informed us of the previous complaints made by your client, and we are therefore anxious to write you fully in order to satisfy you that the present infringement is not due to any bad faith but solely to inadvertence. FOOTBALL FORECAST has recently appointed a new editor [Mr. Grainger, who gave evidence] and in spite of adequate and repeated warnings given to him to avoid infringement of your client's tables the letter received from their correspondent J. C. (Kelly) (whose name is Mr. John Coutts, of 9, Rosewell Terrace, Kelty, Fife) G enclosing the table, was passed by the editor without proper scrutiny.

Then they stated that Mr. Coutts was a coal-miner, and they discussed what damages should be paid to the plaintiff. The defendants' solicitors wrote again on Dec. 1, saying :

> Our client would like, subject to your client's approval, to insert the following H apology in the next issue of FOOTBALL FORECAST.

Then the apology is set out in full. I need not read it at length. To those letters the plaintiff's solicitors replied, saying :

> Our client must insist upon an injunction in open court, and if the remaining matters can be resolved between us, we are disposed to assist your clients to make convenient end to these proceedings by issuing a notice of motion.

Apparently the notice of motion had not yet been issued. Then there was a discussion of the question of damages, and they offered to accept £50 damages and costs. The reply to that was on Dec. 14 :

> Referring to our telephone conversation, we have pleasure in sending you herewith our cheque for £40 in full satisfaction of your claim for damages against both defendants in this action, and we confirm that we will submit to an order for payment of costs as between solicitor and client.

Then there is a postscript :

> It is, of course, understood that you are not taking any action with regard to the earlier infringements.

That offer was accepted. A sum was agreed to cover damages and costs, and in a letter of Dec. 15 the plaintiff's solicitors ended their letter as follows :

> Our client instructs us to say that the infringements, the subject of correspondence with your clients before the issue of the writ herein, will not form the subject of any further action on his part.

That somewhat further defines what had been referred to as the earlier infringements in the previous letter, and, on the construction of these letters, I think it is plain that the only earlier infringements which were covered by the agreement in terms were infringements which had been the subject of correspondence. The end of that action was that on Dec. 18, 1936, Luxmoore, J., the plaintiff and defendants having agreed that the motion should be treated as a motion for judgment, and consenting to the judgment, directed that the defendants, their servants and agents, be restrained from infringing the copyright of the plaintiff in a booklet entitled Systematic Football Betting. Then there was an order for payment of an agreed sum by way of damages and costs. So that, at that stage, the plaintiff had an injunction in general terms to prevent infringement of the copyright in his booklet. Now comes the incident which is the subject of the present action. As the dates may be material, I had better go back a little. There is a letter which appeared in Football Forecast of Nov. 3, 1936. That was a letter signed "Johnig." I need not read the letter through, but Johnig gave a table showing 12 matches and 18 entries. Johnig's letter did not come to the attention of the plaintiff until after the action before Luxmoore, J., which I shall call the first action, had been settled. It is quite clear, upon the evidence, that, if one takes the first nine entries of Johnig's table and the results given in these nine entries for the second, fifth, sixth and eleventh matches, Johnig's table is in substance Table 17. A Mr. Lawrence James Haywood, who gave evidence before me, wrote a letter to The Football Forecast. The signature to the letter was rendered "R. I. H. (Birmingham)," but, having seen the letter, I am satisfied that it was in fact signed "L. J. H. (Birmingham)," but that the initials were not very clear, and were rendered "R. I. H." Mr. Haywood set out two tables, one of which he called a reduced permutation table and the other a recommended table. I shall have to refer in rather more detail to that letter, but for the moment it is sufficient to note that the letter was sent on Nov. 6, 1936. The next stage was that on Dec. 1, 1936, Mr. Haywood's letter was printed in full with certain quite immaterial omissions of a few lines. It will be observed that the letter was received in the first instance before the issue of the writ, but that it was in fact printed after the writ had been issued against the defendants in the first action. The letter, after referring to the letter by Johnig, to which I will refer, goes on to discuss the question as to whether what are called reduced permutation tables are of the practical value that a large number of poolites—as Mr. Haywood calls them, these being persons in the habit of entering for pools—attach to them. The letter continues:

> I have examined several and have come to the conclusion that they are not. I admit that they fulfil the claims made for them [the guarantee].

Then Mr. Haywood goes on to discuss the respective advantages of reduced permutation tables, an example of which he gives, and the table which he recommends as being of more practical use, especially for people who have a good knowledge of football form. I need not read the letter in full. Mr. Haywood gave evidence before me, and explained how he came to put into his letter what he calls the reduced permutation table. As I have already said, the reduced permutation table is undoubtedly a reproduction in substance of Table 17. Mr. Haywood is a tool-maker who lives near Birmingham. He has been interested in football pools for some years. He told me that he put money into them practically weekly, and that he started seven or eight years ago. He told me that in Sept., 1934, he was sent to Coventry by his firm to superintend the removal of some machines. While there, he was at dinner in a public-house. A conversation took place in regard to football pools, and one of the men in the public-house, a stranger to him, produced a coupon filled in with a reduced permutation table. Mr. Haywood thought that the symbols used in the table were 1, 2 and a cross, and, if that is so, it was an exact reproduction of Table 1 in the plaintiff's first booklet, which, as I have said, was published in May, 1934. Having regard to what I think is the extreme difficulty of producing such a reduced permutation table, and to all the circumstances of the case, I have no hesitation in drawing the inference that what was shown to Mr. Haywood in the public-house was in fact a copy of Table 1 in the plaintiff's first booklet. Mr. Haywood told me that he kept the piece of paper for some time and memorised it, but that he did not know what had happened to the piece of paper, and that at times he used this reduced permutation table. He saw Johnig's article in the issue of THE FOOTBALL FORECAST for Nov. 3, and he recognised that Johnig's table included the table which he had been given at Coventry. He had also seen the table by Mr. Conning in the issue of Oct. 3. He told me that the object of his letter was to compare and discuss the two tables. I am satisfied that the reduced permutation table was in fact an effort of memory on the part of Mr. Haywood. I also believe Mr. Haywood when he says that in writing the letter his object was to compare and discuss the two types of table, and he also, as he said, was not without hopes that he would win the half-guinea prize for the best letter that was published weekly in THE FOOTBALL FORECAST. I think that he was a straightforward witness, although he certainly became confused as to exactly whether he got his table from Johnig's table or from his memory.

I now turn to the correspondence leading up to the present action. On Dec. 23, 1936—that is, very soon after the first action had been disposed of—the plaintiff's solicitors wrote to the defendants' solicitors as follows:

> Our client, Mr. Leo Johnstone, has had pointed out to him an article appearing on p. 24 of the issue of THE FOOTBALL FORECAST published by your clients, Bernard Jones Publications, Ltd., and printed by your clients, the Farleigh Press, dated Dec. 1, 1936, and entitled THOSE PENNY POOL-TABLES AGAIN, in which article is given a part of two permutation tables. The first table, "Reduced Permutation Table" (and in the article termed Johnig's table) is an infringement of our client's copyright table reproduced in a book entitled SYSTEMATIC FOOTBALL BETTING at p. 30, under reference Table 18 (*a*) [merely one of the nine varieties of Table 17], a copy of which your clients have had in their possession for some time. Prior to the injunction granted against your clients by LUXMOORE, J., you assured us that the publication in THE FOOTBALL FORECAST on Nov. 17 was due to an oversight of a new manager and on your clients' undertaking not to repeat any similar infringement we advised our client to accept a small sum in respect of damages. This concession, however, does not appear to be appreciated by your clients. The matter is made more serious than would ordinarily be the case by reason of the derogatory and inaccurate comment which your clients have seen fit to print in connection with this deliberate infringement of copyright. Our client's generosity in foregoing his right to delivery up of infringing material in the previous action will not be repeated in this fresh instance of the abuse of his monopoly rights. Having regard to the existing injunction our client's claim in respect of the matter now complained of will be limited to damages and delivery up, and if your clients have any observations to offer before proceedings are commenced we shall be happy to transmit the same to our client for his consideration.

To that the defendants' solicitors replied on Dec. 23:

> We have your letter of even date upon which we have at once spoken to our client. He is dumbfounded at the allegations made, but we hope to receive instructions to reply very fully to your letter early next week.

Then they say that they cannot agree that the plaintiff had been generous in the first action. Then follows a letter of some importance. The defendants' solicitors wrote to the plaintiff's solicitors:

> We have not had an opportunity of taking instructions from the publishers upon your letter of the 23rd instant and must repeat our clients' amazement at the allegations you are instructed to make. The table of which you complain is an independent compilation made from lines 2, 5, 6 and 11 of the table appearing at p. 23 of the issue of FOOTBALL FORECAST for Nov. 3 [Johnig's table]. It was not taken from your client's table but is as stated an original compilation made without reference to your client's table. We do not understand your complaint of derogatory and inaccurate comment. To what comment do you refer?

They say then that they will accept service. The second paragraph of that letter, stating that the table was an independent compilation made from lines 2, 5, 6 and 11 of Johnig's table, and was an original compilation made without reference to the plaintiff's table, was a statement made without first referring to the writer of the letter, Mr. Haywood, who alone could know whether or not the table was an independent compilation. In my view, Mr. Grainger should not have put forward that explanation without having ascertained whether it was a true one or not. I am satisfied that it was not an independent compilation, nor was it made from lines 2, 5, 6 and 11 of Johnig's table. It was, as I have said, merely a recollection by Mr. Haywood of the plaintiff's Table 17. It seems to me most unfortunate that such an explanation should have been put forward in response to the plaintiff's very reasonable objection to the publication of the table. The case put forward in that letter is not at all the case which is established by the evidence. The reply to that letter on Dec. 29, was as follows:

> We thank you for your letter of the 28th instant upon which we are obtaining our client's instructions. Our letter of the 23rd instant was written to you with a view to avoiding proceedings, but as there is so great a difference of opinion between your clients and ours, it seems that the only possible course is to take proceedings. We note you are instructed to accept service of same.

Then on Jan. 8 there is a note from Mr. Jones to Mr. Grainger:

> Permutation Tables. Please do not print any permutation table whatsoever in FOOTBALL FORECAST without first seeing me and getting my initials on the table. The point to be borne in mind is that "Mathematician" has obtained an injunction against us and if inadvertently or otherwise we slip up again we can be had for contempt of court. So please observe my instructions very closely indeed.

As I understand the matter, although that letter is dated, of course, some time after the publication of Mr. Haywood's letter, there had been a warning before the publication of the Dec. 1 letter from Mr. Jones to Mr. Grainger that he must be careful in publishing permutation tables, or words to that effect. The next letter was one of Jan. 15, 1937, from the plaintiff's solicitors to the defendants' solicitors. In that letter, they say this:

> He [the plaintiff] notes your client's claim that the table complained of was prepared from an independent compilation appearing in your clients' issue of THE FOOTBALL FORECAST of Nov. 3. This claim he points out is obviously untenable, in that it would be necessary to have first worked out the table complained of before Johnig's table could have been constructed. The table published on Nov. 17 is itself a copy of our client's Table 91, which as a matter of fact is based on the table of which we complain. Our client also points out that the nine lines which your clients claim form part of Johnig's table are also the first nine lines of the table published in THE FOOTBALL FORECAST on Nov. 17, 1936, and in respect of which your clients have already admitted infringement and consented to an injunction.

The reply to that was on Jan. 18, as follows:

> Our clients, without prevarication, admitted infringement in the table published on Nov. 17, as there had been through lack of vigilance an admitted infringement. They paid handsomely for their neglect—at least we paid £87 5*s.* as a handsome payment for a slip, which caused your client no ascertainable damage. Our clients do not admit infringement in the table published on Dec. 1 as there has been no infringement. Does your client suggest he is entitled to a monopoly of permutation tables? If other persons by independent brain work arrive at a similar conclusion to himself he must know well enough that he is not entitled to stop them from using the result of such independent brain work.

That sentence in the letter, as I read it, puts forward again the suggestion that Mr. Haywood's table was the result of independent brain work on his part. Then the letter goes on:

> If likewise other people desire to criticise his work [the plaintiff's work] they are

> entitled to do so and if necessary to quote from existing works provided such quotation is fairly and reasonably necessary for the purpose of their criticism and our clients regret the attempt made by your client to stifle such criticism.

Here we have the first suggestion made by the defendants' solicitors that, instead of their being an independent compilation, they might justify this letter on the ground that it was criticism of the plaintiff's work, but it is to be noted that, in the very same letter in which they put forward this argument, they repeat the suggestion that the table complained of is a result of independent brain work. Then they go on to argue what would be the result if the plaintiff were to claim a monopoly in permutation tables. I do not think that I need read that part of the letter. Then on Jan. 22 the plaintiff's solicitors write:

> We have now taken our client's instructions upon your letter of the 18th. Our client does not, of course, claim a monopoly of permutation tables, but he does claim, and we think rightly claim, that the printing by your clients of copies of his tables is an infringement of his copyright. We agree, however, with you that further correspondence upon the general topic is of no utility and we have now received instructions to commence proceedings. It is our client's wish, and no doubt also of your clients, that all outstanding matters should be disposed of in such proceedings and so that we may be in a position to instruct counsel fully on the statement of claim, we should be obliged if you would inform us whether your letters are to be construed as a claim of right to reproduce the table contained in your clients' issue of Dec. 1, of which complaint has been made.

That is a very specific request referring to "the table contained in your clients' issue of Dec. 1." The reply is as follows:

> We have your letter of the 22nd instant. When our clients have infringed your client's copyright they have admitted infringement and have not attempted to deny the existence of copyright in your client's work. They have never made any claim to be entitled to infringe any work in which your client has copyright.

That obviously is not a specific reply to the specific question asked. The plaintiff issued the writ in the present action on Feb. 3, 1937.

That being the history of the matter, which I think it was necessary to give in full before approaching the consideration of the questions which I have to decide, I have now to consider the questions which I stated at the beginning of my judgment. First of all, did the letter of R. I. H. amount to a publication by the defendants of a substantial part of the plaintiff's booklets, or either of them? In my view, it did. I am satisfied upon the evidence that Table 17, although small in bulk, was an important table for the purpose of the plaintiff's booklet SYSTEMATIC FOOTBALL BETTING. It is also incorporated in certain other tables in the booklet, which I need not enumerate. As I have said, I think that it was a very original idea, and I think that considerable importance is attached, and rightly attached, to it by the plaintiff for the purpose of his booklet. If it was, as I think, a substantial part of SYSTEMATIC FOOTBALL BETTING, I think that *a fortiori* it was a substantial part of the plaintiff's earlier booklet. I base my view under this heading on a consideration of the evidence as a whole, which I do not propose to review in detail, coupled with the history of the case as revealed in the correspondence. Of course, it is clear that the word "substantial" does not only denote bulk or length of extracts. LORD

COTTENHAM, L.C., in the case of *Bramwell* v. *Halcomb* (2), at p. 738, and in the case of *Saunders* v. *Smith* (3), at p. 736, said:

> When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity.

Although Table 17 is a small part of the plaintiff's booklet, even taking into account the fact that it appears in several places, I do regard it as being a part of value for the purpose for which the booklet was written.

The second question is whether the reduced permutation table in Mr. Haywood's letter is a copy of the plaintiff's work or the result of independent research or labour on Mr. Haywood's part. I have already stated my views as to that, and I am quite clearly of opinion that it was a reproduction in substance of the plaintiff's work.

I now come to the question which has given me by far the greatest difficulty in this case, and that is whether what has been done by the defendants is a fair dealing with the work for the purposes of criticism or review. I think that in his opening speech Mr. Leon relied both on the word "criticism" and on the word "review," but in his closing speech I think that he rested his case principally, if not entirely, upon the word "criticism." First of all, I propose to consider whether Mr. Haywood's letter, quite irrespective of the circumstances of its publication, was in itself a fair dealing for the purposes of criticism within the proviso to sect. 2 (1) of the Act. Mr. Moritz has argued that it was not, for several reasons. He says, in the first place, that an article cannot be a fair dealing with any work for the purposes of criticism unless the work is attributed to its author. I am unable to accede to that argument. I think that, if a work is taken and reproduced, and criticisms are offered upon that work, it is not necessary, in order to bring the case within the proviso, that the name of the author should be referred to in terms. I cannot find any such limitation in the words of the section, and I do not see any reason why I should import that. I think that, if the work is set out and is criticised, that is enough to bring the matter within the words of the section, so far as the purposes of criticism are concerned. Then, of course, one has to consider the question of whether this is a fair dealing for the purposes of criticism. Again taking Mr. Haywood's letter, and for the moment regarding it from the standpoint of the letter taken by itself, apart from the circumstances of its publication, I think that it was a fair dealing with the work as far as Mr. Haywood was concerned. I think that Mr. Haywood honestly desired to offer certain observations by way of comparison and criticism of the two tables which he set out in his letter. Was the publication of this letter, however, fair dealing on the part of the defendants? On this part of the case I have felt much doubt. I think that there is much force in Mr. Moritz' contention that any oblique motive, as he expressed it, on the part of the defendants' editor, Mr. Grainger, would render the publication of the letter in question an unfair dealing, but it is unnecessary for me to

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express an opinion upon the correctness or incorrectness of this contention, because I am not satisfied upon the evidence that there was an oblique motive on the part of Mr. Grainger. However, I think that I should say, in fairness to the plaintiff, in case this matter goes further, that I did not regard Mr. Grainger as a very frank witness, and I cannot help suspecting that Mr. Grainger, in all the circumstances of the case, may have recognised the reduced permutation table in Mr. Haywood's letter as being in substance a reproduction of the plaintiff's work. He recognised it as being in substance four lines from Johnig's letter, and, in view of the complaint which had been made, very shortly before the publication of the letter of Dec. 1, in the shape of the issue of a writ, it would seem strange if Mr. Grainger did not recognise that the table had anything to do with the plaintiff's work. However, whether or not Mr. Grainger recognised the table in question as being a reproduction of the plaintiff's work, that is by no means inconsistent with his taking the view that the letter, as it stood, being in the form of a criticism, was not an infringement of copyright, and I do not think that I should be justified, on the evidence before me, in forming the view that Mr. Grainger's motive in publishing this letter was what Mr. Moritz has called an oblique motive—for instance, the motive of damaging the plaintiff or of taking an unfair advantage of the plaintiff's work. I desire to add only this observation in the nature of a warning to the defendants. I give it, not because I think that Mr. Jones has the slightest desire to take unfair advantage of other people's work—I do not think that he has, and I do not think that at any time he has had such a desire—but because editors come and editors go, and, if, after all that has happened in this case, and in the earlier incidents to which I referred, the defendants again publish in The Football Forecast one of the plaintiff's reduced permutation tables, I, for one, should be more ready to draw the inference that the publication of such a table was not a fair dealing on the part of the defendants.

The result is that the defendants succeed on their defence of fair dealing, and, that being so, the question of damages does not arise. The action must therefore be dismissed, but there remains the question of the costs of the action, a point upon which I have felt some difficulty. I shall direct the plaintiff to pay the costs of the action except in so far as they have been increased by the issue as to whether the table in Mr. Haywood's letter was a copying or an independent compilation, and by the issue as to whether what was taken by the defendants was a substantial part of the plaintiff's work. In so far as the costs have been increased by those two issues, they will be paid by the defendants to the plaintiff, and there will be a set-off.

Action dismissed.

Solicitors: *Judge, Hackman & Judge* (for the plaintiff); *Rubinstein, Nash & Co.* (for the defendants).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

RHOKANA CORPORATION, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Maugham), **February 1, 3, 4, March 15, 1938.**]

Income Tax—Interest on debentures—Payable in foreign currency at fixed rate of exchange—Deduction of income tax—Income Tax Act, 1918 (*c.* 40). *All Schedules Rules, r.* 21—*Finance Act,* 1924 (*c.* 21), *s.* 33 (1)—*Finance Act,* 1927 (*c.* 10), *s.* 26.

A company issued certain debentures secured by a trust deed which provided, *inter alia,* that interest declared at sterling rates should be paid in sterling at the company's bankers in London, or at certain offices in New York in United States of America dollars at the fixed rate of exchange of $4.86 to the £, or at certain offices in Amsterdam, in Dutch florins at the fixed rate of exchange of 12.11 Dutch florins to the £. The deed further provided that interest on registered debentures would be paid by cheque or warrant on the company's bankers sent through the post. The company duly paid the debenture interest on Dec. 31, 1931, deducting income tax at the rate of 5*s.* in the £ upon such interest in sterling. A certain warrant was cashed for dollars. The revenue authorities contended that in respect of that warrant a larger sum for income tax than that deducted by the company should have been deducted, such sum being arrived at by converting the total amount of the interest into dollars at $4.86 to the £, deducting tax in dollars at the rate of 5*s.* to the £, and reconverting this sum into sterling at the rate of $3.39 to the £, the rate of exchange ruling on Dec. 31, 1931 :—

HELD [LORD RUSSELL OF KILLOWEN dissenting] : the primary obligation was to pay the interest in sterling, and the right to get dollars or florins was an additional right, to which All Schedules Rules, r. 21, did not apply. The amount to be deducted in respect of income tax was, therefore, to be calculated on the issue of the warrant, and was not subject to any further alteration.

Order of Court of Appeal ([1937] 2 All E.R. 79) *reversed. Decision of* LAWRENCE, J. ([1936] 2 All E.R. 678) *restored.*

[EDITORIAL NOTE. This case, dealing with the payment of tax upon interest by deduction, is confined to the position where, after the issue of the interest warrant, the holder has the right to cash it in foreign currency at a fixed rate of exchange. The final decision on the point is that, as the company paying the interest have to deduct the tax upon the issue of the warrant, that is the time at which tax must be fixed. It is impossible to say at that date what the rate of exchange will be when the warrant is ultimately cashed, and therefore impossible to calculate the deduction upon that footing.

AS TO DEDUCTION OF TAX UPON PAYMENT OF INTEREST, see HALSBURY, Hailsham Edn., Vol. 17, pp. 229-231, paras. 464-468 ; and FOR CASES, see DIGEST, Vol. 28, p. 82, Nos. 463-468.]

Cases referred to :

(1) *Norman* v. *Ricketts* (1886), 3 T.L.R. 182 ; 12 Digest 472, *3852.*

(2) *Marreco* v. *Richardson,* [1908] 2 K.B. 584 ; 32 Digest 383, *659* ; 77 L.J.K.B. 859 ; 99 L.T. 486.

(3) *Thairlwall* v. *Great Northern Ry. Co.,* [1910] 2 K.B. 509 ; 10 Digest 1160, *8207* ; 79 L.J.K.B. 924 ; 103 L.T. 186.

APPEAL from an order of the Court of Appeal (LORD WRIGHT, M.R., ROMER and GREENE, L.JJ.), dated Mar. 4, 1937, and reported in [1937] 2 All E.R. 79, allowing an appeal by the respondents from an order of

Lawrence, J., dated May 28, 1936, and reported in [1936] 2 All E.R. 678, whereby an appeal by the appellants upon a case stated by the commissioners of income tax was allowed and the decision of the commissioners was reversed. The facts are set out in the opinion of Lord Maugham.

A. M. Latter, K.C., and *A. Andrewes Uthwatt* for the appellants.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

Lord Atkin: My Lords, the question in this appeal is whether an additional assessment for income tax made upon the appellants in respect of the payment of interest on debentures issued by them is rightly made. The material facts and documents are sufficiently set out in the case stated by the special commissioners, and I need not repeat them. The dispute arises out of the option given to the debenture holder in the contract for payment of interest to be found in paras. 1 and 2 and condition 11 of each registered debenture. It may be noted that the issue of debentures is an issue expressed in sterling £4,500,000 7 per cent. debentures in debentures of £25, £100, £500 and £1,000. The obligation in para. 1 relating to principal is:

> in accordance with the conditions indorsed hereon to pay the principal sum of —— pounds sterling [or] the equivalent thereof in U.S.A. dollars at the rate of $4.86 to the pound [or] in Dutch florins at the rate of 12.11 florins to the pound.

In para. 2, the covenant is to pay interest at the rates mentioned, which appear to be expressed only by reference to sterling, "such interest to be subject to United Kingdom income tax." The option as to interest is contained only in condition 11 of the debenture, which is set out in the case. In pursuance of the obligation in the debenture, the company on Dec. 30 and Dec. 31, 1931, signed and issued the warrants for interest, one specimen of which is set out as an exhibit to the case and is the example to which the argument has been addressed. In the judgment in the Court of Appeal, delivered by my noble and learned friend Lord Wright, then Master of the Rolls, he states that the document was not a bill of exchange. I am not quite satisfied about this. If it is to be taken as drawn on alternative drawees, it would no doubt offend against sect. 6 (2) of the Bills of Exchange Act. On the face of it, it looks as though the only drawee was Barclays Bank and the warrant made payable by them at New York or Amsterdam. However, the company seem to have dealt direct with Messrs. J. P. Morgan & Co. in New York, and it may be that the warrant must be taken as drawn on them at New York, in which case there would appear to be alternative drawees, and the section would apply. If not a bill of exchange, it is not a cheque, and the crossing and marking not negotiable seem to lose their statutory effect and not to regain it under the Revenue Act, 1883, s. 17. The document is probably a bill of exchange within the definition of the Stamp Act. If so, the question may arise as to whether the provision that, if presented in New York or Amsterdam, it must lie for examination for four days precludes it from being payable on demand, and as to the effect on the stamp. The precise legal effect, however, of this somewhat anomalous document is by the way. It is admitted that All Schedules Rules, r. 21, applied in this case. The question is how that rule affects this payment. The company say that they have deducted from the sterling amount of interest the amount of income tax calculated in sterling at the appropriate rate, and have accounted for that sum. Income tax, they say, is a tax assessed in sterling at so many shillings and pence in the pound. The commissioners say that the company were in fact paying dollars to the debenture holders who elected to be paid in dollars, and that the value in sterling of the dollars in fact paid should be taken, and that the company should in the first place deduct from the dollars they pay an amount in dollars which represents the ratio which the tax in sterling bears to the amount payable in sterling, and should account to the commissioners for income tax on the value in sterling of the dollars paid under the option at the rate of exchange of the date when the warrant is cashed, i.e., when the dollars are received. The difference is shown in the figures in the case for the payment in Dec., 1931, taking the net figures, which are sufficient to illustrate this point. The sterling amount of warrants cashed in New York was £72,171 13*s.* 1*d.*, representing, at the fixed rate of exchange $4.86, $350,754.12. That number of dollars, though, valued at $3.39, the rate of exchange at the date of the warrant, was worth £103,467 5*s.* 8*d.* The company therefore are liable to an additional assessment of over £31,000. The figure calculated at the rate of exchange at the actual dates of payment is more in favour of the appellants, as the value of the dollar had slightly diminished since Dec. 31.

If this had been a simple order for payment abroad in a foreign currency, with no provision for a fixed rate of exchange, e.g., dollars, and the obligation of the company had rested on r. 21 alone, I should have felt more difficulty in the matter than was experienced by the Court of Appeal. I can understand it being said in such a case that, by deducting from the number of dollars such a number of dollars as bears the same proportion to the whole as the rate of income tax expressed in sterling, the payer is deducting "a sum representing the amount of the tax thereon at the rate of tax in force," e.g., if he had to pay $4,000 and the rate of income tax was 5*s.* in the £, he might be said to be making payment of interest of "money," and by deducting $1,000 to be deducting a sum representing the amount of tax. By para. 2 of the rule, however, his duty is "forthwith" to deliver an account of the payment and of the "tax" deducted out of the payment, and the special commissioners "shall assess and charge the payment of which an account is so delivered on that person." The charge must obviously be in sterling, and assumes, therefore, that the payment and the tax deducted are in sterling, and it seems to me difficult to apply these terms to a payment and deduction of tax in a foreign currency.

I find it still more difficult to apply the terms of the original rule as it stood before amendment by the Finance Act, 1927, s. 26 (1), for in the original rule the obligation to account was "of the *amount* deducted," not "tax deducted," and every such amount shall be a debt from him to the Crown, and shall be recoverable as such, and, in my opinion, there can be no debt in this country of an amount in foreign currency. I find it difficult to believe that the Finance Act, 1927, made a change in this respect. It is said, however, that the sterling amounts can be calculated by reference to the rate of foreign exchange. If this is taken at the exchange of the day when the order for payment is given, I can understand the obligation to account "forthwith" being said to be performed; but if the rate of exchange is to be taken as of the varying days when each interest warrant is cashed, the machinery seems to me to break down. I cannot think that the rule imposes upon the company the obligation to render a separate account for each interest warrant as and when paid, or that the commissioners are intended to make a series of assessments and charges for each such account. There is no provision at all for provisional and final assessments, and I think it plain from the nature of the case that the intention of the rule is that there should be one accounting "forthwith," which, in the case of warrants in a foreign currency, which have to reach the foreign bank and have six months in which to run, is, in a business sense, impossible. The matter does not rest there. By the Finance Act, 1924, s. 33, which is to be read with the Income Tax Act, 1918, and was in force when All Schedules Rules, r. 21, was altered by the Finance Act, 1927, every interest warrant drawn or made by a company must have annexed thereto or be accompanied by a statement in writing showing:

> (*a*) the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually paid; and (*b*) the rate and the amount of income tax appropriate to such gross amount; and (*c*) the net amount actually paid

Here is nothing about "sum representing the amount of the tax." One must show when one draws the warrant the gross amount which, after deduction of the income tax appropriate thereto, corresponds, etc., and also the rate and amount of income tax. I do not see how one can deduct income tax, which is a tax in sterling, from dollars, and, in a case where the tax is based on the value of the dollars at a future time, it appears to be impossible to comply with the section. I, therefore, should have found great difficulty in supporting this assessment had the obligation been a direct obligation confined to payment in dollars, but, in the circumstances of the present case, the problem is not so troublesome. In my view, taking into account all the documents, the primary obligation is to pay in sterling, and the stipulation "subject to British income tax" confirms this. The contract is to pay to the holder the balance that remains after deducting from the sterling sum the amount of the income tax calculated on that sterling sum, and it is the balance only of which the holder at his option can claim payment in the foreign

currency. I think that the true view is that, for income tax purposes, the company pay the interest in sterling, and perform their obligation to the revenue by deducting the correct amount in sterling and accounting for it as they have done. If any of the debenture holders by receiving dollars have obtained in money's worth more than the value of the
A sterling sum deducted, they will be assessable with the extra value, if the authorities are in a position to assess them. I am bound to say that I am glad to arrive at this result, for this is machinery procedure by which the payers of interest are made vicariously liable for tax due from the recipients. The contention of the Crown would impose onerous
B duties on persons who are taxable merely as agents, and, if such burdens as are suggested in the present case are to be placed on agents for the convenience of the revenue, the statutory provision ought to be clearly expressed. I will only add that, in my opinion, nothing in this case throws doubt upon the obligation of a taxpayer to account in a sterling
C valuation for profits and gains which he receives in foreign currency, or can in any way interfere with the free play of commerce expressed in any currency which the business man finds suitable. I am of opinion that this appeal should be allowed, and that the order of LAWRENCE, J., should be restored, and that the respondents should pay the costs here
D and in the proceedings below.

LORD THANKERTON: My Lords, I concur in the opinion which has just been delivered by my noble and learned friend LORD ATKIN, but, out of respect to the judges of the Court of Appeal, I desire to add some
E observations. The decision of this appeal turns mainly on the construction of the Income Tax Act, 1918, All Schedules Rules, r. 21, as amended by the Finance Act, 1927, and the Finance Act, 1924, s. 33. Rule 21 (1) provides:

> Upon payment of any interest of money, annuity, or other annual payment
> F charged with tax under Sched. D. or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

The Finance Act, 1924, s. 33, provides:

> G (1) Every warrant or cheque or other order drawn or made, or purporting to be drawn or made, after Nov. 30, 1924, in payment of any dividend or interest distributed by any company, being a company within the meaning of the Companies (Consolidation) Act, 1908, or a company created by letters patent or by or in pursuance of an Act of Parliament, shall have annexed thereto or be accompanied by a statement in writing showing: (a) the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually
> H paid; and (b) the rate and the amount of income tax appropriate to such gross amount; and (c) the net amount actually paid.

There has been much debate as to the meaning of "time of payment" in r. 21, and, if the matter depended on that rule alone, difficulty might arise as to when payment is made within the meaning of the rule. In my opinion, however, any doubt as to its meaning is resolved in the case of companies to which sect. 33 of the Act of 1924 applies, of which the appellant company is one, as regards the payment of the interest due on its debentures.

Sect. 33 (1) relates to the time when the warrant or cheque or other order is drawn or made, and, in my opinion, clearly regards that time as the period of distribution, and it places the duty of complying with A its provisions on the company that draws or makes the warrant, cheque or other order. The almost invariable method of distributing such warrants, cheques or other orders is by posting them, and it seems to me inevitable that the duty enjoined by the section must be performed before such posting, and that the figures prescribed by heads (*a*), (*b*) B and (*c*) must equally be ascertained and embodied in the annexure or accompanying statement referred to in the section before posting the warrants, cheques or other orders. With all respect to the judges of the Court of Appeal, whose judgment stops short of dealing with this point, I am unable to understand how the time of the encashment of the C warrant, cheque or other order—at a period subsequent to its being drawn or made—can be of any relevance for the purposes of the section. This is confirmed, as my noble and learned friend LORD ATKIN has pointed out, by the provision in r. 21 (2), as amended, that the account is to be delivered forthwith to the commissioners of inland revenue. D

I further agree with my noble and learned friend LORD ATKIN that the figures contemplated by heads (*a*), (*b*) and (*c*) of sect. 33 (1) are clearly figures in sterling, and that, in the present case, the primary obligation of the appellants is to pay the debenture interest in sterling, subject to British income tax, and that the option given to the debenture holders E to claim payment in foreign currency applies to the balance only after deduction of British income tax. I am therefore of opinion that the appellants did conform to the provisions of r. 21 and sect. 33 of the Act of 1924, and that the appeal should be allowed.

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LORD RUSSELL OF KILLOWEN: My Lords, I find myself in disagreement with your Lordships, for to my mind the judgment of the Court of Appeal is both convincing in its reasoning and sound in its conclusions.

I will not restate the facts, which are not in dispute, but I will indicate what I conceive to be the question which we are called upon to determine, G stating it in terms of, and by reference to, the interest warrant which was sent on Dec. 30, 1931, to the registered debenture holder, Rhodesian Anglo-American, Ltd. The question which we have to answer, as I understand it, is this. The debenture holder, having received from the company in respect of debenture interest a sum of $201,448, which, at H the date of receipt, was worth, at the then current rate of exchange, a sum in sterling largely in excess of the net amount of sterling stated in the warrant to be payable, is the company accountable and assessable under the Income Tax Act, 1918, All Schedules Rules, r. 21, for more than the sum in sterling which was deducted from the gross interest expressed in sterling, in arriving at the net amount of sterling stated in the warrant to be payable to the debenture holder ? If the case falls within, and fits into, the wording of r. 21, there can be no escape from the view that the company is bound to deduct the full tax for which the debenture holder is liable, and to pay it to the commissioners of inland revenue.

The following is an extract from r. 21 as amended by the Finance Act, 1927, s. 26 :

> (1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sched. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.
>
> (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the commissioners of inland revenue, for the use of the special commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the special commissioners shall assess and charge the payment of which an account is so delivered on that person.

Does the case fall within and fit into the wording of that rule ? Apart from the question as to what is " the time of the payment " under the rule, I see no difficulty. The words " interest of money, annuity or other annual payment charged with tax under Sched. D " must include cases where payments of those kinds are payable in foreign currencies, and it is quite feasible to deduct thereout upon payment thereof the proper fraction thereof, which will (whatever be the rate of exchange then prevailing) necessarily answer to the words " a sum representing the amount of the tax thereon at the rate of tax in force at the time of payment." It was suggested that the word " sum " postulated a sum of sterling, but I can see no ground for this. In the case of a payment in foreign currency, a direction to deduct a sum thereout naturally refers to a sum in that currency, and it would appear as if the direction were phrased in general terms (instead of being a simple direction to deduct the amount of the tax) in order to cover the cases of payments in currencies other than sterling.

So, comformably with that reading of r. 21 (1), the warrant could, in the present case, have been framed, and the appropriate deductions have appeared upon its face. The Court of Appeal have pointed out how the warrant inferentially shows the appropriate deductions as matters of mere arithmetical calculation, based upon the fixed rates of exchange which are stated on its face. They could, however, have been shown in tabular form, with a column devoted to each kind of currency. It is a matter of difficulty to state accurately what kind of a document the warrant is in law. It purports to be a cheque drawn on a London bank for the payment to the debenture holder or order of a sum in sterling, but in fact it is a document entitling the payee or order to receive payment of either a sum in sterling from a London bank or a sum in dollars from a firm in New York or a sum in Dutch florins from an institution in

Amsterdam. Whatever the document may be in law, it could have shown on its accompanying certificate of deduction of income tax the gross amounts of interest, the appropriate deductions for income tax, and the net amounts payable in each of the three currencies. Thus, assuming, for simplicity's sake, a gross sum for interest in sterling of £1,000, and fixed rates of exchange of $4 to the £, and 12 florins to the £, the income tax being at 5*s.*, there could have appeared (i) a sterling column showing £1,000 gross with a deduction fo £250 income tax, leaving a net sum payable of £750 ; (ii) a dollar column showing $4,000 gross, with a deduction of $1,000 "representing" the amount of tax, leaving a net sum payable of $3,000 ; and (iii) a florin column showing 12,000 florins gross, with a deduction of 3,000 florins "representing" the amount of tax, leaving a net sum payable of 9,000 florins. In each case, whatever might be the rate of exchange prevailing when the debenture holder cashed the warrant and received payment in a foreign currency, there would have been deducted by the company making the payment from the gross amount of interest :

> a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

The question is then raised : What is the time referred to in r. 21 by the words "upon payment" and "the time of payment" ? I feel no difficulty in this regard. It must, in my opinion, refer to the moment of time when, as between the person liable to make the annual payment and the person entitled to receive it, the liability of the former is discharged. When did payment take place in the present case ? No doubt as a general rule the giving and acceptance of a debtor's cheque is a conditional payment, and, upon the cheque being subsequently met, the payment for many purposes is by relation back treated as having in fact been made on the earlier date. It by no means follows, however, that this artificial view of the true facts applies to r. 21. In the present case, moreover, the eleventh condition of the debenture establishes, in my opinion, that, as between the company and the debenture holder, the liability to pay the interest is satisfied only when the warrant is cashed, and that the posting of the warrant is in no sense payment of the interest, conditional or otherwise. Indeed, if the theory of conditional payment be applied here, and if this warrant be in law a cheque, and the posting of it be conditional payment, the interesting result will follow that a conditional payment of sterling made on Dec. 30, 1931, in England will become an actual payment of sterling as on that date, by reason of the receipt on Jan. 9, 1932, of a sum of dollars in New York. Or is it that the conditional payment of sterling becomes retrospectively an actual payment of dollars ? I know not.

I am of opinion that payment of the interest was made within the meaning of r. 21 when each warrant was cashed, and that upon each payment there should have been deducted the proper proportion of sterling, dollars or florins, according to the currency in which the pay-

ment was made, for which the company would have to account to the inland revenue in sterling at the rate of exchange prevailing at the time when the interest was paid. The account must be delivered "forthwith," but this requirement of r. 21 will be complied with if the accounting takes place without delay, i.e., as soon as is reasonably possible in the
A circumstances.

The case seems to me to fall naturally and properly under the provisions of r. 21, and I do not find that this view of the case is in any way hampered by the Finance Act, 1924, s. 33. That section appears at first sight to be not very happily worded, because, while dealing with what
B is to be included in a warrant which a company is drawing, it seems to refer, in stating what is to appear thereon, to the moneys with which it is dealing as "actually paid"; but in fact the section is dealing with what must appear in a warrant which has been cashed, because it refers to the dividend or interest in question as having been distributed by
C the company. On any view of the section, however, a warrant drawn with the three columns for the different currencies would comply with the section, showing, as they would, "the rate and amount of income tax appropriate to the gross amount of interest." I note that here again the enactment uses general words, namely, "appropriate to"—which
D can well cover the case of an appropriate deduction from a foreign currency. I agree with the Court of Appeal that in any event the position under r. 21 is unaffected. I would dismiss the appeal.

LORD MACMILLAN: My Lords, I am in agreement with the opinions
E which have been delivered by my noble and learned friends, **LORD ATKIN** and **LORD THANKERTON**. I am also in agreement with the opinion of **LORD MAUGHAM**, which I am about to read.

LORD MAUGHAM [read by **LORD MACMILLAN**]: My Lords, this appeal
F raises the question whether the appellant company by the joint effect of the Income Tax Act, 1918, All Schedules Rules, r. 21 (as amended by the Finance Act, 1927, s. 26) and of the Finance Act, 1924, s. 33, was liable, when it paid interest by cheques or warrants on its debentures on Dec. 31, 1931, to deliver a single account of the payments and of the
G tax deducted out of these payments as at Dec. 31, or whether it was liable as each cheque or warrant was cashed, whether in London, New York or Amsterdam, to deliver a separate account of the payment on each cheque or warrant and of the amount of the tax deducted out of such payment. It should be added that r. 21 and sect. 33 of the Act
H of 1924 have to be construed together (see sect. 41 (1) of the latter Act).

These two provisions, in general, occasion no difficulty, but in this case the debentures are in an unusual form, one which does not seem to have been contemplated by the legislature. By the terms of the trust deed, the company are liable to pay to the registered holder the amount secured in pounds sterling or the equivalent thereof in United States of

America dollars at the rate of $4.86 to the £ or in Dutch florins at the rate of 12.11 Dutch florins to the £. As regards interest, it has to be paid at the rate of 7 per cent. by equal half-yearly payments on June 30 and Dec. 31 in each year, either in sterling at Barclays Bank in London or in United States dollars at the rate of $4.86 to the £ at the offices of Messrs. J. P. Morgan & Co. in New York, or in Dutch florins at the rate of exchange of 12.11 Dutch florins to the £ at the offices of a Dutch bank in Amsterdam.

The company's registered office is in England, the debentures are sterling debentures, all of which are registered in England at the company's registered office, interest is expressly made payable subject to United Kingdom income tax, and the debentures provide (condition 11) that the interest:

> will be paid by cheque or warrant on the company's bankers sent through the post to the registered address of the holder, or in the case of joint holders to the registered address of that one who is first named on the register: and every such cheque or warrant shall be payable to the order of the person to whom it is sent and payment of the cheque or warrant if purporting to be duly indorsed shall be a satisfaction of the interest.

It is therefore clear that the debenture holders were entitled to cheques or warrants on the company's bankers for the amount of the interest due to them in sterling. The superadded alternative rights were to obtain instead of sterling amounts of American dollars in New York or Dutch florins in Amsterdam at fixed rates of exchange. It is an irrelevant fact for the purposes of the appeal that a prudent debenture holder would be likely (in and subsequent to Dec., 1931) to prefer to receive American dollars in New York or Dutch florins in Amsterdam, owing to the fact that sterling had depreciated in the United States and in Holland. He was entitled to receive his interest in sterling in London, and by the cheque or warrant he was (according to the usual practice) given six months before he was bound to cash the cheque or warrant in London or to require the payment of the proper equivalent amounts of dollars or florins at the pegged rates above-stated. A certain number of debenture holders in fact cashed their cheques in London.

My Lords, it is, I think, indisputable that the function of a company in such a case is to act as collector for the commissioners of inland revenue. The company, where any such payment is made, has forthwith to deliver to the commissioners an account of the payment, and of the tax deducted out of the payment, and the special commissioners must assess and charge on the company the payment of which an account is so delivered. Next, it is plain that the liability of the company arises upon payment of the interest, and the obligation to deduct the tax is imposed at the time of payment. Payment and deduction are concurrent, and it was admitted on behalf of the Crown that the deduction of the tax must be at the rate of tax in force at the time of the payment. In my opinion, it is clear that the deduction must be in sterling. It is a deduction of "a sum representing the amount of the tax," a phrase which might be ambiguous, but the account to be delivered to the commissioners must be an account in sterling, since the commissioners have "to assess and charge the payment of which an account is so delivered."

In the case of a company paying dividends or interest by warrant, A cheque or other order (sect. 33 (1)), there is a further liability imposed, with a penalty for non-compliance. An explanation of the tax deduction made by the company has to be annexed to the warrants or cheques, showing:

(*a*) the gross amount which, after deduction of the income tax appropriate thereto, B corresponds to the net amount actually paid; and (*b*) the rate and the amount of income tax appropriate to such gross amount; and (*c*) the net amount actually paid.

It is to be noted that the warrants, cheques or other orders are described in the section as being drawn or made "in *payment* of any dividend or interest distributed by" the company. In my opinion, since this C section has to be construed with r. 21, it follows that, in the case of a company, the legislature is recognising the fact that such cheques, warrants, or orders are in general usage in these cases, and are treated in the commercial world as, payment of the dividend or interest, and, what is more to the purpose, the subsection is distinctly providing that D the tax is to be deducted at the date of posting the cheque. This is clear from the fact that the tax deduction must be at the rate of tax in force at the time of the payment which is assumed to be made by warrant, cheque or order. In a case where, as usual, the cheques need not be cashed for six months, the company could not comply with either (*a*), E (*b*), or (*c*) of the particulars which have to accompany the cheques if they were posted (as in this case) at a time less than six months before the date of the Budget resolutions, for the rate of tax might be altered. In other words, sect. 33 requires statements to be sent to the shareholder or debenture holder, with the warrants or cheques described as payment, F which *could not* be completed unless the amount of tax to be deducted was of tax at the rate when the warrants or cheques are posted. It follows inevitably that, in the ordinary case where a company pays its dividends or debenture interest by cheque or warrant, the account to be delivered forthwith to the commissioners is of the payments so made and G of the tax deducted at the rate then in force. It is impossible to make the machinery adopted in r. 21 and sect. 33 applicable if it were to be held to be that there is no payment within the rule until the warrants or cheques are cashed.

Apart from the express terms of sect. 33 (1), a similar conclusion might H be founded on the well-known common law rules as to the effect of the sending of a cheque in payment of a debt, and on the fact that, though the payment is subject to the condition subsequent that the cheque must be met on presentation, the date of payment, if the cheque is duly met, is the date when the cheque was posted. It will be remembered that, by condition 11 of the debentures, the interest is payable to the debenture holder by sending the cheque or warrant by post, which brings the case within the principles laid down in *Norman* v. *Ricketts* (1), *Marreco* v. *Richardson* (2), and *Thairlwall* v. *Great Northern Ry. Co.* (3). In my opinion, however, the conclusion that the cheque or warrant is payment for the purposes of r. 21 is a consequence of the correct construction of that rule together with sect. 33.

Is this position in any way altered by the fact that the warrants, cheques or orders in this case contained on their face statements that they were payable at the option of the holder at any time within six months in sterling at Barclays Bank, Lombard Street, or in dollars at the fixed rate of exchange of $4.86 to the £ at the offices of J. P. Morgan & Co. in New York, or in Dutch florins at 12.11 florins to the £ at a bank in Amsterdam? My Lords, if it is admitted, and I see no escape from the admission, that every debenture holder was entitled on Dec. 31 to a cheque or warrant on the company's bankers in sterling, it follows that the company was at that date under a statutory duty to comply with r. 21 and sect. 33. That is, it was bound to deduct from the amount due for interest a sum representing the amount of the tax thereon at the rate of tax in force at that time, and to accompany the cheque or warrant by a statement containing the particulars under heads (*a*), (*b*), and (*c*) of sect. 33 (1). That statement could not state anything then unknown, and therefore could not state the rate and the amount of income tax which would become due if the holder of the cheque or warrant exercised his option to take dollars in New York or florins in Amsterdam at an uncertain date before June 30, since not only the rate of income tax at the date of encashment but also the rate of exchange from dollars or florins into sterling at that date were alike unknown, and no account could be rendered of the tax deducted in respect of the profit or gain on the exchange if the option to take foreign currency were to be exercised. It is not to the point to state that the amounts of dollars or florins could be stated. The point is that the amount of the appropriate deduction of tax in respect of the foreign currencies could not be known at the date, Dec. 31, when a duty to comply with r. 21 and sect. 33 arose as regards the warrants or cheques sent to the debenture holders. This, in my opinion, is sufficient for the decision of the appeal. It will be noted that I express no opinion as to the position which may arise when the interest consists simply of a warrant for payment of an amount in a single foreign currency. It may be that the rule and the section can be applied in such a case if it can be held that the payment within the rule is not made till the warrant is encashed. Being satisfied that warrants or cheques in payment of interest were made in this case on Dec. 31, and that the obligations of the company under r. 21 and sect. 33 forthwith arose, it is my opinion that the company complied with its duties on Dec. 31, and that no further obligations were imposed on it. In other words, I think that the rule and section imposing on the company the duty of collecting the tax on interest cannot be held to extend to the collection of duty upon what LAWRENCE, J., calls the added rights to get dollars or florins. In substance, I agree with his judgment. The Crown, in my view of the case, must be left to collect the duty in respect of the added rights by means of its own exertions. I concur in the proposed motion.

Appeal allowed with costs and order of LAWRENCE, J., *restored.*

Solicitors: *Holmes, Son & Pott* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

LLOYDS BANK, LTD. *v.* BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **March 9, 10, 1938.**]

Agency—Mercantile agent—Pledge of documents—Surrender of documents to pledgor upon trust for sale—Pledge to third party—"Owner"—Factors Act, 1889 (*c.* 45), *s.* 2 (1).

A company pledged certain bills of lading with the plaintiff bank as security for bills of exchange or advances. The letter of hypothecation gave the bank power without further reference to the company to sell or otherwise deal with the goods as though the bank were the absolute owners thereof. The plaintiff bank then handed the bills of lading back to the company at its request, so that they or the goods represented by them might be sold and the proceeds held in trust for the plaintiff bank, as stipulated in trust receipts which were given to the plaintiff bank. Instead of selling the bills of lading and goods and paying the proceeds to the plaintiff bank, the company pledged the bills of lading to the defendant bank by way of security for advances made. The company became insolvent, and the plaintiff bank sought to recover from the defendant bank the bills of lading or the goods or damages for their conversion:—

HELD: (i) the rights of ownership in these bills of lading had by the course of dealing between them become so divided between the company and the plaintiff bank as to make them jointly owners within the meaning of the Factors Act, 1889, s. 2 (1).

(ii) alternatively the letter of hypothecation made the plaintiff bank the owner of the goods within the meaning of that section.

(iii) the bills of lading had in either case come into the company's hands with the consent of the owners, as so determined.

(iv) the company, acting as mercantile agent, having pledged the bills of lading, the defendant bank had acquired a good title to them.

Decision of PORTER, J. ([1937] 3 All E.R. 312) *affirmed.*

[**EDITORIAL NOTE.** In the court below, PORTER, J., held that the plaintiff bank was the "owner"; but the Court of Appeal have held that the bank and the company were joint owners, though it is apparently agreed that upon the construction of the letter of hypothecation in this case the bank may also be regarded as the owner. This makes no difference to the result, as it is decided that the company can still be the mercantile agents of the joint owners.

AS TO PLEDGE OF DOCUMENTS OF TITLE WITH BANK, see HALSBURY, Hailsham Edn., Vol. 1, p. 863, para. 1400; and FOR CASES, see DIGEST, Vol. 3, pp. 277-282, Nos. 864-867.]

Cases referred to:

(1) *Sewell* v. *Burdick* (1884), 10 App. Cas. 74; 41 Digest 372, *2186*; 54 L.J.Q.B. 156; 52 L.T. 445; *revsg.* S.C., 13 Q.B.D. 159; *restg.* (1883), 10 Q.B.D. 363.
(2) *The Odessa* (1882), 46 L.T. 77; 41 Digest 765, *6183*.
(3) *Reeves* v. *Capper* (1838), 5 Bing. N.C. 136; 32 Digest 231, *163*; 8 L.J.C.P. 44.
(4) *North Western Bank, Ltd.* v. *Poynter, Son & Macdonalds*, [1895] A.C. 56; 3 Digest 277, *865*; 64 L.J.P.C. 27; 72 L.T. 93.
(5) *Re Allester (D.), Ltd.*, [1922] 2 Ch. 211; Digest Supp.; 91 L.J.Ch. 797; 127 L.T. 434.
(6) *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.*, [1935] A.C. 53; Digest Supp.; 104 L.J.P.C. 1; 152 L.T. 170.
(7) *Franklin* v. *Neate* (1844), 13 M. & W. 481; 39 Digest 361, *23*; 14 L.J.Ex. 59; 4 L.T.O.S. 214.
(8) *Monk* v. *Whittenbury* (1831), 2 B. & Ad. 484; 1 Digest 330, *467*.
(9) *Jenkyns* v. *Usborne* (1844), 7 Man. & G. 678; 39 Digest 626, *2236*; 13 L.J.C.P. 196; 3 L.T.O.S. 300.
(10) *Lamb* v. *Attenborough* (1862), 1 B. & S. 831; 1 Digest 334, *484*; 31 L.J.Q.B. 41.
(11) *Baines* v. *Swainson* (1863), 4 B. & S. 270; 1 Digest 331, *469*; 32 L.J.Q.B. 281; 8 L.T. 536.
(12) *Hayman* v. *Flewker* (1863), 13 C.B.N.S. 519; 1 Digest 332, *472*; 32 L.J.C.P. 132.
(13) *Fuentes* v. *Montis* (1868), L.R. 4 C.P. 93; 1 Digest 336, *500*; 38 L.J.C.P. 95; 19 L.T. 364.
(14) *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354; 1 Digest 333, *477*; 44 L.J.C.P. 233; 32 L.T. 733.
(15) *Oppenheimer* v. *Attenborough & Son*, [1908] 1 K.B. 221; 1 Digest 336, *503*; 77 L.J.K.B. 209; 98 L.T. 94.
(16) *Weiner* v. *Harris*, [1910] 1 K.B. 285; 1 Digest 334, *487*; 79 L.J.K.B. 342; 101 L.T. 647.
(17) *Lowther* v. *Harris*, [1927] 1 K.B. 393; Digest Supp.; 96 L.J.K.B. 170; 136 L.T. 377.
(18) *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.*, [1934] 2 K.B. 305; Digest Supp.; 103 L.J.K.B. 613; 151 L.T. 396.
(19) *Budberg* v. *Jerwood & Ward* (1934), 51 T.L.R. 99; Digest Supp.

Appeal from a judgment of Porter, J., dated June 8, 1937, and reported in [1937] 3 All E.R. 312. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

Sir William A. Jowitt, K.C., and *James Wylie* for the appellants.

Hon. Sir Stafford Cripps, K.C., and *H. G. Robertson* for the respondents.

Jowitt, K.C.: This being a pledge the pledgee has only a special property, and the ownership remains in the pledgor, Strauss & Co., Ltd. Although a pledgee has not the ownership, he has sufficient authority to maintain an action for trover or detinue. Lloyds Bank, on parting with the documents for a special purpose, did not lose their legal rights as pledgees. [Counsel referred to *Sewell* v. *Burdick* (1), *The Odessa* (2), *Reeves* v. *Capper* (3), *North Western Bank, Ltd.* v. *Poynter, Son & Macdonalds* (4), *Re Allester (D.), Ltd.* (5), *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.* (6).] In order to take advantage of the Factors Act, 1889, one must have an owner entrusting goods to an agent who receives them as such in the ordinary course of his business. The owner must be a full owner in the popular sense. A person having only a special interest cannot be an "owner" under the Factors Act, since the latter must at least have the immediate right to sell. It is quite wrong to say that Lloyds Bank were owners. They were mere pledgees, and had no right to sell. The man who had the right to sell was Strauss. Thus the first question is whether Strauss was the owner, and the second is whether Strauss was a mercantile agent. The only sense in which he could be an agent was that he had frequently acted as a trust agent to sell his own goods under pledge to the bank. A mercantile agent is one who receives commission. Strauss, of course, got no commission, and was not a mercantile agent within the meaning of the Act. Even if we assume the owner to be the bank, and the mercantile agent to be Strauss, there is still the difficulty that the goods must have been entrusted to the agent as agent, and dealt with by him in the ordinary course of business. Of course, Strauss did not sell as our agent, for, if the goods had been defective, we could not have been sued. Strauss & Co. may have been selling by the authority of a composite owner—that is to say, Strauss & Co. plus the bank. The bank alone could not sell, and therefore they could not make Strauss & Co. their agents to sell. [Counsel referred to *Franklin* v. *Neate* (7), *Monk* v. *Whittenbury* (8), *Jenkyns* v. *Usborne* (9), *Lamb* v. *Attenborough* (10), *Baines* v. *Swainson* (11), *Hayman* v. *Flewker* (12), *Fuentes* v. *Montis* (13), *Cole* v. *North Western Bank* (14), *Oppenheimer* v. *Attenborough & Son* (15), *Weiner* v. *Harris* (16), *Lowther* v. *Harris* (17), *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.* (18), *Budberg* v. *Jerwood & Ward* (19).]

Cripps, K.C.: The fallacy underlying the argument of the appellants is their effort to use the trust receipts for the purpose of securing priority. Though they gave up the physical possession, they retained the juridical possession. Strauss & Co. were therefore the trust agents for sale on behalf of Lloyds Bank or Lloyds Bank and Strauss & Co. The letter of hypothecation says "as though you were absolute owners thereof," and is the overriding document on which business was done between the bank and Strauss & Co. The bank could have sold at any moment without reference to anyone. [Counsel referred to *North Western Bank, Ltd.* v. *Poynter, Son & Macdonalds* (4), *Re Allester (D.), Ltd.* (5), and *Lowther* v. *Harris* (17).] Strauss & Co. could not sell for themselves at all, apart from the bank, and must therefore have been selling purely as agents of the bank. The "owner" is the person without whose express consent the other party cannot carry out the transaction in question at all. Where one has an authority to sell, one may assume under the Factors Act an authority to pledge: *Oppenheimer* v. *Attenborough & Son* (15).

Wylie, in reply.

SIR WILFRID GREENE, M.R.: This appeal from a judgment of

PORTER, J., raises what at first sight appeared to be a question not only novel but also difficult, but, now that the matter has been very fully discussed before us, the question becomes, in my opinion, a simple one, and the answer is not open to any real doubt.

The dispute arises out of certain commercial transactions of a very familiar type. The plaintiffs, Lloyds Bank, Ltd., acted as bankers for a company which carried on the business of merchants both in India and in England. That company was a company called Strauss & Co., Ltd. For the purpose of financing the purchases of goods which that company made in India with a view to their being shipped to Europe and there disposed of, the method adopted was, in outline, of this nature. They had an arrangement with Lloyds Bank in India under which they sold to that bank documents in the form of bills of exchange drawn by themselves upon what was really themselves; although it was in one sense the London office, yet it was the same company. Drawer and drawee, accordingly, were the same, but that point is of no importance. When a bill was purchased by Lloyds Bank in India, there were handed to the bank with it the shipping documents relating to the goods, and by that means there were sent by Lloyds Bank in India to Lloyds Bank in London bills and shipping documents. Those bills were in due course accepted, and the business went through in the ordinary way.

Lloyds Bank regarded Strauss & Co., Ltd., as a company of high standing in the matter of credit, as, indeed, in the earlier days they were, and it was the practice of Lloyds Bank in London to allow Strauss & Co., Ltd., to have possession of the shipping documents in order to effect sales of the merchandise to which they related. This facility, which, of course, involved their parting with the shipping documents which were hypothecated to them, they allowed only up to a limit of £50,000. That is to say, when the amount owing by Strauss & Co., Ltd., to the bank exceeded £50,000, their practice was to part with the shipping documents only upon receiving from Strauss & Co., Ltd., a very familiar type of document known as a trust receipt.

In the present case, Strauss & Co., Ltd., obtained possession of certain bills of lading and invoices which had been hypothecated, according to this system, to Lloyds Bank, in each case upon the terms of a trust receipt. The dispute which has arisen arises from the circumstance that, instead of dealing faithfully with those goods according to their obligations to Lloyds Bank, Strauss & Co., Ltd., fraudulently pledged the goods by depositing the bills of lading with the defendants, the Bank of America National Trust & Savings Association. The result is that there is in dispute a sum of some £34,000, representing the proceeds of sale of goods, and each party claims to be entitled to that sum. There is a minor point with regard to a small sum, part of that sum, which, upon the view which we take of this case, it is not necessary to discuss.

It was held by PORTER, J., that the defendants, to whom the shipping documents had been hypothecated in this fraudulent manner, had a right which took precedence over the right of the plaintiffs, Lloyds Bank, Ltd., the original pledgees, and he held that they had that superior right by virtue of the provisions of the Factors Act, 1889. The question which arises is a very short question of the construction of that Act as applied to the particular circumstances of this case.

The matter depends in the first place upon the consideration of certain documents, because it is from them that the relationship between the parties is to be ascertained. There were two documents which I may conveniently describe as covering documents, because they were documents of a general character and not confined to some particular transaction, and they formed the basis of the financial dealings between Strauss & Co., Ltd., and Lloyds Bank.

The first document (I am not sure whether this was the one actually in force at the relevant time or whether it is merely an example, but it does not matter) is dated May 21, 1930, and is signed by Strauss & Co., Ltd., in India, and handed to Lloyds Bank in India It is described as " Letter of hypothecation—general (bills purchased)." It is addressed to Lloyds Bank, and is signed on behalf of Strauss & Co., Ltd. By it Strauss & Co., Ltd., agree that .

> all bills and/or documents which we may from time to time hand you for purchase or discount, or against which you make us advances, and the goods thereby represented, and the proceeds thereof, are to be held by you as a continuing security for the payment on demand of the said bills so purchased or discounted and of all advances, banking accommodation and/or expenses which you may make, afford or incur to or for us in connection therewith and all other liabilities to you present and future.

Therefore it is a general agreement of hypothecation in respect of every manner of liability, whether on bills, on advances or on banking facilities. It proceeds :

> and you are to be at liberty to exercise all our rights (if any) as unpaid sellers of the said goods, and without further reference to us to sell, insure, warehouse or otherwise deal with the said goods as though you were the absolute owners thereof.

The rest of it I need not read. The document therefore gives in the widest possible terms a power of sale or other dealing with the goods comprised in any documents deposited with Lloyds Bank.

It was said on behalf of the appellants that the power of sale which was thereby given was a power which arose only when a demand had been made by Lloyds Bank for moneys owing to them from Strauss & Co., Ltd. I cannot read the power of sale as so limited. It appears to me that it is a power of sale which could have been exercised at once, notwithstanding the fact that no demand had been made. Upon the view which I take of this case on other grounds, I do not think that the decision of that particular question is of importance, although my own opinion is clearly what I have stated.

The other covering document was a document signed on behalf of Strauss & Co., Ltd., in England and handed to Lloyds Bank in England. It is in this form :

> We authorise and request you and/or your nominees in India to give banking

> accommodation against and/or negotiate on or before Dec. 31, 1934, any bill or bills payable at or at a term not exceeding three months after sight and drawn on us by or indorsed by Strauss & Co., Ltd., and in consideration thereof we hereby agree duly to accept any such bill or bills for any sum or sums not exceeding in the aggregate £125,000 outstanding at any one time, this being a continuing agreement and to pay the amount of such bill or bills at maturity. You will receive with such bill or bills but merely by way of collateral security to you bills of lading for merchandise grain and/or seeds together with policy or certificate of marine insurance and invoice and we agree that in the event of any default on our part you shall be at liberty to sell or cause to be sold (entirely at your discretion) any of the said merchandise by public auction or private sale and apply the net proceeds towards payment of the said bill or bills. . . .

That, therefore, is a special document relating to the acceptance of bills which had been purchased or discounted in India and which had been drawn or indorsed by Strauss & Co., Ltd., there. In the event of any default of their obligations, which were to accept the bills and to pay them at maturity, there was a power of sale, and it is said, and I think that it is said with truth, that the particular power of sale given by this document arises only on default. That is to say, in cases where a bill has been accepted, it will arise only where it is not paid at maturity. That is a matter which I do not think is of any importance in this case.

There is another form before us which is exactly the same as the one which I have read, but it has a particular reference to trust receipts in these terms: "If required we will sign a trust receipt when any documents are released to us." That was contemplating the procedure which I have already described, under which, when the accommodation granted exceeded £50,000, shipping documents would be released against trust receipts.

It was the practice to release those documents, and it is important to notice the purpose for which they were released. The transaction is one so familar, and has been referred to in so many cases, and its objects are so notorious, that it is almost with apology that I refer to any allegations or evidence on the matter, but the plaintiffs, in their statement of claim, say this:

> The bills of lading, invoices and relative merchandise referred to in para. 10 hereof were handed by the plaintiffs [Lloyds Bank] to the company [Strauss & Co., Ltd.] in order to enable the company to sell the merchandise as trustees for the plaintiffs in pursuance of the terms of the letters of Jan. 2 and Jan. 14, 1935.

Those are the trust receipts. A passage in the evidence which also deals with that matter was referred to. Mr. William Hedley Robinson, an accountant in the Eastern department of Lloyds Bank, and concerned with the carrying on of this particular business, was asked:

> You had from time to time released to them the documents as against such trust receipts for the purpose of their selling the goods?—Quite so.
>
> The object of their selling the goods was to realise moneys to pay to your bank, in order to meet the bills?—That is so.

Then later he was asked:

> So far as the release of the bills of lading was concerned in these particular cases, was it your intention that Strauss & Co. should be able to give a good title to the purchasers of the goods?—Yes.

The goods, therefore, were released, and, when they were released, Lloyds Bank took from Strauss & Co., Ltd., the trust receipt.

The trust receipt schedules a large number of bills of lading relating to a quantity of goods and also relating to bills which had been drawn under this procedure. The document is dated Jan. 2, 1935, and is the only one A to which I will refer. It is in this form :

> We hereby acknowledge the receipt of the undermentioned documents under lien to you and undertake to and declare that we act as your trustees for the landing, storage and sale of the relative merchandise. We also undertake that the said merchandise will be stored in approved warehouses separate from any other goods whether belonging to ourselves or other persons. We also undertake that the B proceeds of the sale of the said merchandise or any portion thereof will be received by us as your trustees and kept separate from other moneys, and will be remitted to you as and when received by us. We also undertake to keep the said merchandise fully insured, the relative policy or policies of insurance being held and the proceeds thereof or of any other insurance of the said merchandise being received by us as your trustees and remitted to you as and when received. We further undertake to return to you on demand the balance of the said merchandise in respect of which you may not have received proceeds.

C

Upon the terms of that document, the bills of lading and the invoices with which we are concerned in this case were handed to Strauss & Co., Ltd., and they had no right to deal with the documents in any way inconsistent with the terms of that receipt. About that there can be no D possible doubt. It is to be observed that, at the date when this document was given and the shipping documents released, the particular bills to which those documents were related had not yet matured for payment. The bills in question, which are referred to in the schedule to this trust receipt, were three-months bills accepted on Dec. 31, 1934, which E made the due date, allowing for the days of grace, Apr. 3, 1935. On behalf of the appellants, a strong point was made of the circumstance that, at the date when the trust receipt was signed and handed over, and the shipping documents handed over, and at the date when Strauss & Co., Ltd., deposited the shipping documents with the defendants, the bills F had not yet become due for payment. It was said that, on the footing of that fact, the dispositions made by Strauss & Co., Ltd., of the shipping documents must be regarded as having been made by them in their capacity as having the general ownership of the goods. There is no necessity to refer to the details with regard to what Strauss & Co., Ltd., G did towards the defendant bank. They deposited these documents very shortly after they had got them.

On that state of facts, the first question which arises is, quite shortly, this. Were Strauss & Co., Ltd., mercantile agents in possession of those shipping documents with the consent of the owner ? I will put on one H side for the moment the question as to whether they were mercantile agents, because that is a question on which we have not heard a very great deal of argument. I will proceed at once to the question upon which the greater part of the argument has turned. It is said : When one looks at the relevant date, which is the date when Strauss & Co., Ltd., came into possession of these documents, is it true to say that they were in possession of those documents with the consent of the owner? The argument, if I understood it correctly, was of this nature, that, where goods have been pledged, the only person whom one can with correct use of language describe as the owner is the pledgor. As justification for that, it is said that the pledgor is the person who has the general property in the goods, and that the interest of the pledgee is merely a limited and particular interest. As an abstract proposition, that, no doubt, is one which is, in substance, correct. The question in this case, however, is: Who is the owner for the purpose of this section? I myself find it only confusing to go into abstract questions of what the word "owner" may mean in other contexts and for other purposes. The object of the section and the history of the legislation are too familiar to require statement. When I look at the language of sect. 2 of the Factors Act itself, I find in it what appears to me to be a very clear clue to the meaning of the word "owner." I had better read sect. 2 (1):

> Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

The section, therefore, upon its face is contemplating that the person it describes as the "owner" will be the person in a position to give express authority with regard to the dealing in question. It seems to me that a person not in a position to give that express authority cannot by himself constitute what is described as the owner. It may, of course, very well be, and it happens very frequently, that the incidents and rights of ownership are divided among two or more hands. One person may have the right to possession, which is one of the rights incident to ownership, and another person may have all the other rights incident to ownership. Nevertheless, it is only the two of them who can confer on a third party the ownership of the property in question. It is only by their combining in an assignment that they can confer a good title. I am quite unable to read the word "owner" in this section as excluding such a case. It seems to me that, where the right of ownership has become divided among two or more persons in such a way that the acts which the section is contemplating could never be authorised save by both or all of them, those persons together constitute the owner. If it is with the consent of those persons that the mercantile agent is in possession of the documents, then he is in possession of the documents with the consent of the owner within the meaning of the section.

In the present case, if Lloyds Bank and Strauss & Co., Ltd., had agreed to employ a broker in Mincing Lane, and with the consent of both of them, which was necessary because the bank had the right of possession, these documents had been handed to that broker, and thus come into his possession, I cannot for one moment doubt that the broker would have been in possession of the documents with the consent of the owner within the meaning of the section, the owner being, for that purpose, the two of them acting in combination. In the present case, according to a practice which is as familiar as any mercantile practice can be, the person entrusted with the sale was not a third person at all, but the actual merchant himself. Does that make any difference from the point of view of the construction of the section? In my opinion it does not. It is perfectly true (and here for a moment I am disregarding the special language of the covering documents in this case, to which I shall return later) that the pledgor obtained possession of the documents in contemplation of a sale which was to some extent in his own interest, and which would affect his own title as pledgor, and to that extent may be regarded as intending to act as a principal in the transaction, but I find in the section nothing which excludes from the case contemplated the case where the mercantile agent himself has got some interest in the property with which he is dealing. It seems to me that one may have a case, and, for all I know, it may be a common case, where a person who is himself a mercantile agent has, in combination with somebody else, the ownership of goods. A mercantile agent may have some interest in goods the remaining interest in which is vested in somebody else. It seems to me quite impossible to say that, where such a mercantile agent is allowed to have possession of the goods with the consent of the other person interested, for the purpose of selling, the section does not apply because the mercantile agent himself has also got some interest which must be brought in in order to give a purchaser a complete title. It appears to me that that would be putting too narrow a meaning on the section. In such a case, the possession would be referable in part to the mercantile agent's own interest and in part to the consent of the person having the residuary interest, who in combination with the agent would be the owner for the purposes of the section.

I have dealt so far with the question of whether or not the documents of title came into the hands of Strauss & Co., Ltd., with the consent of the owner. In my opinion, they were in the possession of Strauss & Co., Ltd., by the consent of Lloyds Bank, together with Strauss & Co., Ltd., themselves, in so far as any consent by them was necessary.

It is said—and said, I think, with great force—by Sir Stafford Cripps that, quite apart from the general proposition which I have been endeavouring to state (which applies, if it be correct, generally to all cases where the incidents of ownership have come into more than one hand), upon the particular documents of this case, the bank, and the bank alone, was the owner for the purposes of the section. He refers to the provisions of the covering letter of hypothecation, which I have read, which empowers the bank to sell as though they were the absolute owners. It seems to me that, by virtue of that contract, the relationship of the bank to these particular goods and the documents of title representing them was the relationship of owner, in that they were given power by that document to exercise all the rights of ownership over the goods. On that rather narrower ground, quite apart from the ground which I stated earlier, it seems to me that Strauss & Co., Ltd., were in possession of the goods with the consent of the owner, who, on that hypothesis, would be the bank.

It is said that the trust receipt is not a document under which Strauss & Co., Ltd., were constituted mercantile agents. It is said that it is not an agency document at all, but merely a permission by the pledgees to the pledgors to exercise their own power of disposition. I have had some little difficulty in following that argument, but, doing it the best justice that I can, it appears to be to this effect. Strauss & Co., Ltd., had the general property in the goods. Upon the power of disposition which that general property would generally carry there was a clog—namely, the right of the bank as pledgee—and, by virtue of the transaction when the shipping documents were released and the trust receipt taken, the bank removed that clog, leaving the general property of Strauss & Co., Ltd., free from the clog. The position then was that Strauss & Co., Ltd., were in possession of the shipping documents as owners, without any right at all in the bank, and it was as owners that they dealt with the shipping documents. With all respect to that argument, it appears to me to be completely misconceived. It fails to recognise the true relationship of Strauss & Co., Ltd., to the documents which they received. It was by virtue of the trust receipt, and by virtue of the trust receipt only, that Strauss & Co., Ltd., obtained what they never could have obtained otherwise as against the bank—namely, possession of those documents—and the terms laid down in the trust receipt on which they obtained possession constitute them trustees for the landing, storage and sale of the relative merchandise. It contains an undertaking that the proceeds of sale will be received as trustees for the bank, and it provides that any unsold balance of the merchandise will be returned to the bank. It appears to me, as the result of that document, which alone embodies the terms upon which they obtained back the shipping documents, to follow that, by virtue of the authority from the bank to Strauss & Co., Ltd., they were entitled to sell the goods comprised in the shipping documents, and to sell them (to use the words of Astbury, J., in dealing with a document of this character) as trust agents for the bank. Except in that capacity and by virtue of this document, they would have had no title whatsoever to do the things which this document contemplates that they shall do. Without obtaining the documents from the bank (and they only obtained them by signing this document), they never could have made an effective sale of the merchandise, delivery of the merchandise to a purchaser and receipt of the purchase money from a purchaser, because the right of the bank under its pledge would have stood in the way. It is therefore only by virtue of this authority that they become empowered to sell the goods.

It seems to me that the case, looked at in that way, is a clear one of an authority given to a mercantile agent who is employed in that capacity for that purpose within the meaning of the section. I do not think it necessary to go further into the question as to the meaning of the words "mercantile agent" in connection with the particular circumstances of this case, because I think that the argument to which I have just referred relating to the trust receipt is really the substantial argument that is put forward in opposition to the view that Strauss & Co., Ltd., were mercantile agents. In the result, therefore, I have come to the same conclusion as that to which PORTER, J., came, though I am not sure that I have not arrived at it by a rather different route. In my opinion the case is one which is covered by sect. 2 of the Factors Act; and the defendants are entitled to succeed. The appeal must be dismissed with costs.

SCOTT, L.J.: I agree with the reasoning and with the result of the judgment of SIR WILFRID GREENE, M.R., and do not feel that I should add anything useful by making any further observations.

MACKINNON, L.J.: I agree. I do not know when, as a matter of history, this practice of a bank releasing documents under a trust receipt began, but sixteen years ago, in a case before ASTBURY, J., I observe that it was described as a well-established mercantile practice in these transactions, and I have an idea that it is of very long standing.

There was some suggestion that, if the decision in this case was to the effect that a person who was in possession of documents released to him pursuant to such a trust receipt would be in the position of a mercantile agent under the Factors Act, it might have a serious effect upon the continued use of that practice in the future. I do no apprehend any such danger or difficulty. The truth is that almost every aspect of commercial dealing is not proof against the possible result of very rare frauds that a lawyer, thinking of the possibilities of such things, might suppose to be so easy. In this case, Strauss & Co., Ltd., in breach of good faith, and in breach of their contract, pledged these goods, and thereby improperly obtained money upon the value of them; but, if they had sold the goods and misappropriated the purchase price, they would only have been acting in a rather different way in breach of their duty and in breach of their contract, and in that case the plaintiffs would have had no shadow of a claim against anybody except Strauss & Co., Ltd. I have no doubt that this very convenient practice will be able to continue, and that it will be able to continue because the whole basis of business rests upon honesty and good faith, and it is very rarely that such an expectation is defeated. I agree that the appeal fails.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Allen & Overy* (for the appellants); *Slaughter & May* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

BEATTIE *v.* BEATTIE.

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P.), **March 7, 9, 1938.]**

Divorce—Collusion—Monetary agreement—Husband's previous attempts to bribe wife—Secret acceptance of sum for costs—Wife's change of attitude towards divorce—Absence of bargain—Full disclosure—Matrimonial Causes Act, 1937 (c. 57), *s.* 4. A

A husband was from 1934 to 1936 constantly attempting to bribe his wife to bring divorce proceedings. About the end of 1936 he offered to pay the costs of initiating such proceedings if his wife would bring them. About the same time the wife for reasons of her own came to the conclusion that it was then desirable in her own interest that she should B be free. In Sept., 1937, she accepted a sum of £15, to be applied to the payment of the cost of bringing a petition for divorce, she being bound in honour so to apply the money or to return it to the husband, and not to disclose the matter to her solicitors. The matter was subsequently fully disclosed to the solicitors and to the court:—

Held: as, upon the facts, the wife had determined to bring divorce proceedings, the acceptance of the money did not constitute a collusive C bargain in consideration of which the proceedings were commenced.

[**EDITORIAL NOTE.** A petition for divorce presented as the result of a monetary agreement between the spouses is always regarded with suspicion by the court, and this is so where the money payment is one of costs, to which the wife would ultimately be entitled. In the present case, however, the suggestion of collusion is D answered by the fact that the wife had at the time made up her mind that she, in fact, desired to divorce her husband for reasons of her own, unconnected with those actuating the husband in seeking to persuade her to do so.

As to Collusion, see HALSBURY, Hailsham Edn., Vol. 10, p. 678, para. 1002; and for Cases, see DIGEST, Vol. 27, pp. 333, 334, Nos. 3133-3144.]

Cases referred to: E

(1) *Carmichael* v. *Carmichael* (1925), 42 T.L.R. 133; 27 Digest 332, *3125*.

(2) *Malley* v. *Malley* (1909), 25 T.L.R. 662; 27 Digest 334, *3139*.

(3) *Laidler* v. *Laidler* (1920), 90 L.J.P. 28; 27 Digest 336, *3155*; 123 L.T. 208.

(4) *Churchward* v. *Churchward & Holliday*, [1895] P. 7; 27 Digest 334, *3143*; 64 L.J.P. 18; 71 L.T. 782.

F

Undefended Petition of wife for dissolution of marriage on ground of adultery. The only question upon which the case is reported is that of collusion, the facts of which are fully stated in the judgment.

H. Durley Grazebrook for the petitioner.

G

Sir Boyd Merriman, P.: This is a wife's petition for divorce, and I reserved my judgment because suspicions of collusion were raised which, in my opinion, required careful consideration. I must say in passing that I have considered whether or not I ought to have referred the matter to the King's Proctor for his assistance, but I am satisfied that I have all H the material facts before me, and that ultimately the decision rests upon the impression that I formed of the wife's evidence, and that the responsibility for the decision must be mine alone.

The facts, which it is necessary to state, are as follow: The parties were married in 1931. If I say that the married life was not a very happy one,

I am understating it, because, in fact, in 1931 the wife left her husband, and they have never lived together again. I am quite satisfied that, at the time when she left her husband, she already had ample material on which she could take divorce proceedings. Her own evidence was that she was unwilling to do so because, to put it in her own words, she did
A not wish any other woman to go through what she had gone through. From that time onwards, they went their several ways. The next fact of importance is that in the years 1934 to 1936 it is perfectly plain that the husband was constantly attempting to bribe his wife to bring divorce proceedings. He urgently desired his freedom, and said that he wished
B to leave this country and go to South Africa, where he had a wealthy relative, and in one form or another he offered £500 to pay the costs, or, to put it more broadly, anything to induce his wife to bring divorce proceedings. As regards a cash consideration, I may say at once that I am satisfied beyond the slightest possible doubt that the wife never
C contemplated for a moment accepting a cash bribe from her husband to bring divorce proceedings. What does require more careful consideration —very careful consideration—is his offer, constantly repeated, to pay the costs if she would bring proceedings. By the end of 1936 he had asked her to find out what the costs would be, and in Feb., 1937, having
D seen two or three separate solicitors, she had obtained an estimate of £15 to £20, for the purpose, I suppose, of initiating proceedings rather than that of carrying them right through. At any rate she had obtained an estimate that for the sum of £15 to £20 it would be possible to start proceedings. In Mar., 1937, the husband reiterated his request that she should
E bring divorce proceedings, and she then told him the results of her inquiries with regard to costs. He indicated in the plainest possible way that evidence would be forthcoming if she decided to take proceedings. She said that she would think it over. In September, the husband telephoned again, and on this occasion he said, as I find was the fact,
F that the evidence was in the post, and he wanted again to know what his wife was prepared to do about it. The result was that she agreed to meet him next day, and they met. She accepted £15 from him. She signed some sort of a document—which I have not seen because, if it is in existence at all, it is in the husband's possession—to the effect that the
G money should not be used for her own personal benefit, and I imagine it was stated—in fact, I think she said that it was stated—that it was to be used for the costs. More unfortunate still, he extracted a promise from her that she would not tell her solicitors. I think that a fair interpretation of the document that she signed would be this. It is not
H suggested that it can be regarded as a binding legal instrument, but, as between themselves, the understanding, I think, was something to the effect that, without there being any definite promise to take divorce proceedings, if she did not, she would be in honour bound to return the £15.

This recital of the facts makes it perfectly obvious that there are here many of the elements of a collusive bargain. It is plain beyond possibility of argument that the husband was doing everything he possibly could to get his wife to bring a collusive divorce suit, and the situation was not made easier by the fact that the evidence of adultery, which was sent in a registered envelope in September, was of adultery for one night with an unknown woman at a Brighton hotel, the husband himself being A employed at a South Coast hotel in a neighbouring town, and although this hotel bill related to a date in July, before this interview in September, it related to an incident after their last previous discussion in March.

I have so far stated the facts, as they seemed after some confusion as to dates, from the worse point of view, and, if before Jan. 1, 1938, there B had been the slightest doubt, which, of course, there was not, that a transaction of this sort required the most careful scrutiny, it is even more plain, if possible, that since Jan. 1, 1938, that scrutiny is required, for by sect. 4 of the Matrimonial Causes Act it is laid down that on a petition for divorce it shall be the duty of the court to inquire as far C as it reasonably can into the facts alleged, and—missing out immaterial words—whether any collusion exists between the parties. Then the duty of the court is stated in the following words:

> (2) If the court is satisfied on the evidence that . . . (iii) the petition is not D presented or prosecuted in collusion with the respondent . . . the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition.

The only assistance which I got in the matter in the course of the discussion was a reiteration that there had been full disclosure and that the solicitors concerned had acted with perfect propriety when the matter E came to their knowledge. Taken by themselves, neither of those matters, though both are perfectly valid points, assists me in this case, because, as LORD MERRIVALE, P. pointed out in *Carmichael* v. *Carmichael* (1), if what is disclosed is, in fact, a collusive arrangement, no disclosure alters it, and the fact that the solicitors, as they unquestionably did, acted with F perfect propriety when the matter was brought to their attention does not affect the matter, because the vice of this transaction, if it was a vicious transaction, was that, without the solicitors' knowledge, but with the knowledge of the wife, the petition was presented in collusion, if this was a collusive arrangement. It is not a case of its having been prosecuted G in collusion after the solicitors knew the facts. The case, if it is a case of collusion at all, is collusion in presentation of the petition. However, I was not really satisfied in my own mind that the essence of the matter was as sinister as the recital of the facts which I have made appears to show. H

In passing, I ought to say that I share the view which MCCARDIE, J., took of the decision in *Malley* v. *Malley* (2), where BIGHAM, P. had said in effect that, if the arrangement related to something—costs, for example, or maintenance—with regard to which the wife had rights which she could enforce, the arrangement was not collusive. I agree with the comments of McCARDIE, J., on that decision in *Laidler* v. *Laidler* (3). It may or may not be an important factor in deciding whether the arrangement is collusive, but it cannot be decisive that the bargain, if there is a bargain, is one which relates to something which the wife could otherwise get by some process of law, and it seems to me to be reasonably clear that the well-known case of *Churchward* v. *Churchward & Holliday* (4), decided by SIR FRANCIS JEUNE, P., in 1895, could not have been decided as it was if that had been the decisive test.

To return to the facts, there is one thing in this case to which I have not yet referred, and which seems to me to be of very great importance. I have already said that the wife gave in chief a very confused account of the dates. I went through the whole story again with her in order to satisfy myself what the real sequence of events was, and she gave, or, put more accurately, she emphasised in the course of this second statement of the facts, the fact that, whereas she had said very emphatically that for two years or more she had absolutely refused to consider her husband's request that she should divorce him on any terms whatever, the situation changed from her own personal point of view in Jan., 1937. She had an opportunity then of disposing of the lease of the business which she was conducting entirely independently of her husband, and was proposing to take advantage of this and to go back into the hotel service in which both she and her husband had been engaged. She came to the conclusion that it was in her own interest that she should be free, and, when the husband got into touch with her again a month or so later, she realised then more strongly that, if she were going back into the hotel business as manageress, she could not afford to have her husband habitually ringing up, bothering her to take divorce proceedings. She thought—and I think that she very naturally thought—that it would jeopardise her career. Accordingly, I am satisfied, and I find as a fact, that she had definitely decided on her own account, and for her own reasons, that she would take divorce proceedings. That of itself is not decisive, if, notwithstanding that decision, and in order to carry it into effect, she nevertheless afterwards made a collusive bargain. I am bound to say that the state in which things were left in March—that she would think it over, that the husband undertook that evidence would be forthcoming whenever she made up her mind, coupled with the conversation in September, and this most unfortunate arrangement, by which she accepted the money while at the same time undertaking to conceal it from her solicitors—has given me the gravest anxiety, having regard to the duty which the statute imposes upon me, not indeed for the first time, though it may be that the burden of satisfying the court is more strongly placed upon the parties. After thinking it over carefully, I have come to the conclusion that the reality of the matter is that she never really made any bargain at all. It is quite true that she would have been in difficulty—not, I think, in insuperable difficulty—in finding the money to start proceedings, but I think that she would have done it, and could have done it, apart altogether from this offer of her husband's. It was a most unwise and dangerous thing to do. In the case to which I have already referred, Lord Merrivale said that every transaction, either between the parties or between their legal advisers, during the pendency of divorce proceedings—and, I would add, in contemplation of pending divorce proceedings—which makes material elements of the decree of A divorce the subject of negotiations taints the transaction with the suspicion of collusion, and must be avoided both by the parties and by their representatives. However, I have come to the conclusion that I can fairly find in this case that, in fact, she never made any bargain to bring the proceedings at all. She was determined to bring proceedings. She B did accept this money, but she never, in fact, made any arrangement that in consideration of that money she would bring proceedings.

I think that that is the real truth of the matter, and, as I have come to that conclusion, I can fairly say that I am satisfied that this petition was not presented in collusion. In due course, when this matter came C out, the solicitors, as I have already said, dealt with the situation with perfect propriety, and I am satisfied that all material facts have been laid before me. I said a short time ago that disclosure by itself cannot validate a bargain, if that which is disclosed is of itself a collusive bargain, but it is only fair to say that, if the matter is susceptible of a sinister or of D an innocent interpretation, the fact that a full and candid disclosure has been made, as I think it has been made in this case, does, or may, enable the court to adopt a more charitable view. I had considerable doubt in the first place, but, after careful consideration, I find that I am able to pronounce a decree in this case, and I do so with costs. E

Solicitors: *Freke Palmer, Romain & Romain* (for the petitioner).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

ROBINSON BROTHERS (BREWERS), LTD. *v.* HOUGHTON AND CHESTER-LE-STREET ASSESSMENT COMMITTEE.

[HOUSE OF LORDS (Lord Maugham, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan), **February 17, 18, 21, 22, March 17, 1938.**]

Rates—Assessment—Licensed property—" Tied house."

A firm of brewers, following the usual custom at the present time, instead of letting a public-house to a tenant, put a manager in charge of it. The house was in effect a tied house, and it was admitted that brewers were prepared to pay a higher rent for houses in which a manager could be placed in this way. The rating authority assessed the house at a higher figure, on these grounds. On appeal to quarter sessions, and thence to the Divisional Court, it was held that the principle enunciated in *Bradford-on-Avon Assessment Committee* v. *White* (1) applied as well to a house in which a manager was placed as to a house sublet, and that, in estimating the gross value, regard ought not to be had to the special price which brewers might give, except in so far as such special price might raise the market value generally. On appeal, the Court of Appeal reversed the decision of the Divisional Court, holding that all considerations tending to affect the value of a hereditament must be taken into account, including the higher rent brewers were prepared to pay in such a case for the public-house, and overruled the decision in *Bradford-on-Avon Assessment Committee* v. *White* (1) on the ground that it was wrong in law. Thereupon this appeal was brought :—

HELD : (i) the proper assessment should be at a figure which had regard to the competition of brewers, and to the increased rents which they might offer.

(ii) the decision in *Bradford-on-Avon Assessment Committee* v. *White* (1) was wrong in law, and the present case was not a favourable one for the application of the doctrine of *stare decisis*.

Order of Court of Appeal ([1937] 2 All E.R. 298) *affirmed.*

[**EDITORIAL NOTE.** For many years when brewers purchased a public-house and desired to attach a " tie " thereto they let the premises to a tenant, introducing the " tie " into the lease. Of recent years, brewers have preferred to effect the same purpose by placing a manager in the house rather than by letting or sub-letting it. In either case, the brewers would be willing to give a higher price for premises to which a tie could be attached, and it is now decided that such higher price must be taken by the assessment committee as the basis of the valuation for rating purposes. In coming to their decision, the Court of Appeal overruled the case of *Bradford-on-Avon Assessment Committee* v. *White* (1), although it had stood as an authority since 1898, and had since that time been continuously acted upon by rating authorities, and, it was said, had been taken as the law in the framing of subsequent legislation. Upon both these points the House of Lords has now affirmed the decision of the Court of Appeal.

AS TO THE RATING OF LICENSED PREMISES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 425-427, para. 862 ; and FOR CASES, see DIGEST, Vol. 38, pp. 566, 567, Nos. 1047-1055.]

Cases referred to :

(1) *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630 ; 38 Digest 567, *1052* ; 67 L.J.Q.B. 643 ; 78 L.T. 758.

(2) *R.* v. *London & North Western Ry. Co.* (1874), L.R. 9 Q.B. 134 ; 38 Digest 543, *878* ; 29 L.T. 910 ; *sub nom. R.* v. *Bedford Union Assessment Committee & Goldington Parish Overseers*, 43 L.J.M.C. 81.

(3) *Westminster Corpn.* v. *Southern Ry. Co. and Smith & Son, Ltd., Westminster Corpn. and Kent Valuation Committee* v. *Southern Ry. Co. and Pullman Car Co., Ltd.*, [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J.K.B. 537; *sub nom. Re Southern Ry. Co.'s Appeals*, 155 L.T. 33.

(4) *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1933] A.C. 402; Digest Supp.; 102 L.J.P.C. 33; 149 L.T. 169.

Appeal from an order of the Court of Appeal (Greer, Slesser and Scott, L.JJ.), dated Mar. 23, 1937, and reported in [1937] 2 All E.R. 298, allowing an appeal by the respondents against an order of the Divisional Court dated Apr. 1, 1936, and reported in [1936] 1 All E.R. 751, whereby an appeal by the respondents upon a special case stated was dismissed and the order of quarter sessions was affirmed. The facts and the arguments are set out in the opinion of Lord Macmillan.

A. M. Latter, K.C., and *Michael E. Rowe* for the appellants.

A. S. Comyns Carr, K.C., and *Frederick Grant* for the respondents.

Lord Atkin: My Lords, I am requested by Lord Maugham, L.C., to say that he has had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Macmillan, and that he agrees with it. I also agree with it.

Lord Thankerton: My Lords, I also concur.

Lord Russell of Killowen: My Lords, I also have had the same opportunity, and I agree with that opinion too.

Lord Macmillan: My Lords, this appeal is concerned with the ascertainment of the gross annual value under the Rating and Valuation Act, 1925, of a fully licensed public-house known as the White Lion Hotel, at Houghton-le-Spring, in the county of Durham.

The hereditament having been entered in the current valuation list as of the gross annual value of £112, the appellants, the occupiers of the premises, made a proposal, pursuant to sect. 37 of the Act, for an amendment of the valuation list by the reduction of this figure. The assessment committee, the present respondents, refused to make any alteration of the valuation. The appellants thereupon appealed to the court of quarter sessions of the county, which allowed the appeal and fixed the gross annual value at £95. The assessment committee, being dissatisfied with this decision, obtained a stated case for the opinion of the High Court on the question as to whether the:

> decision fixing the gross value of the said hereditament at £95 was correct in law; and if not what ought to be done in the premises.

The stated case came in the first instance before a Divisional Court composed of Lord Hewart, L.C.J., and Humphreys and du Parcq, JJ., who affirmed the decision of quarter sessions as correct in law. On appeal, the Court of Appeal (Greer, Slesser and Scott, L.JJ.) reversed the decision of the Divisional Court, and restored the original valuation of £112. Your Lordships have now to determine finally this protracted controversy.

The precise findings of fact by the court of quarter sessions are of such importance that I propose to quote them verbatim from the stated case rather than to attempt to paraphrase or summarise them. They are as follow:

> (*a*) The said hereditament is a fully licensed public-house and has been at all material times occupied by the company and managed by a manager in the employment of the company. All the draught beer sold and some of the bottled beer sold in the said hereditament has at all material times been beer brewed by the company or by its associated company but considerable quantities of bottled beer brewed by Messrs. Bass and Messrs. Worthington were also sold.
>
> (*b*) A large number of licensed public-houses in the committee's assessment area and elsewhere are occupied by brewers and managed by managers in the employment of such brewers. This practice was uncommon in the case of ordinary public-houses down to the time when the case of *Bradford-on-Avon Assessment Committee* v. *White* (1) was decided and for some years thereafter. Practically all the public-houses in the said assessment area are owned by brewers and either managed, as in the case of the said hereditament, or sublet to tied tenants.
>
> (*c*) A brewer taking a tenancy of the said hereditament would be able thereby to secure the use of the premises for the sale of beer from his own brewery and thus to secure a larger output and a profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make.
>
> (*d*) There were several brewers who, if the said hereditament had been vacant and to let, might reasonably have been expected to compete with each other for a tenancy of the said hereditament.
>
> (*e*) If regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises for the reasons mentioned in sub-para. (*c*) hereof, might be willing to give, the rent at which the said hereditament might reasonably have been expected to let from year to year would be sufficiently high to support a gross value of £112. Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which the hereditament might reasonably have been expected to let from year to year to a tied tenant of a brewer would be sufficiently high to support a gross value of this figure.
>
> (*f*) If the competition of the brewers is taken into consideration but the rents which they might reasonably be expected to give for the reasons mentioned in sub-para. (*c*) hereof are excluded from consideration except so far as the possibility of such rents being given raises the rent which might reasonably be expected to be given by a tenant not influenced by those reasons, the rent at which the said hereditament might reasonably have been expected to let from year to year would only be sufficiently high to support a gross value of £95.

On these facts, the court of quarter sessions, being of opinion that they were bound to follow the decision in the case of *Bradford-on-Avon Assessment Committee* v. *White* (1), fixed the valuation at £95, but they added that, if they had considered that they were not bound by that decision, they would have fixed the gross value of the hereditament at £112. The Divisional Court, in affirming the decision of quarter sessions, also held that they were bound by the authority of the *Bradford* case (1). The Lords Justices of the Appeal Court, not being bound by that case, were of opinion that it was wrongly decided, and, being free to reconsider the whole matter, held that on sound principles the original valuation of £112 should be restored.

It will be at once apparent that the real question at issue centres round the *Bradford* case (1) and the principles there enunciated. This case was subjected to prolonged and searching analysis at your Lordships' bar, and it is necessary to examine it minutely, as I now proceed to do, in order to ascertain precisely what was there decided.

The Rising Sun Inn, the public-house in question in the *Bradford* case (1), belonged to a firm of brewers, and was let by them to Mr. White as a tied house at a rent of £27 10*s*. The assessment committee, disregarding the tied rent, entered the premises in the valuation list at the gross estimated rental of £85. On objection they reduced the figure to £70. The court of quarter sessions on appeal further reduced the assessment to £35, and their decision was affirmed by the Divisional Court (RIDLEY and CHANNELL, JJ.). The statute at that time regulating the matter was the Parochial Assessments Act, 1836, which in sect. 1 required that the rate for the relief of the poor should be made :

> upon an estimate of the net annual value of the several hereditaments rated thereunto ; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

The language of the section of the Act of 1925 relevant to the present case, which I shall quote later, is substantially the same. Upon the hearing of the appeal at quarter sessions (see p. 631)

> it was alleged that in recent years there had been great competition among rival firms of brewers in the district of Bradford-on-Avon and elsewhere for the purchase or renting on lease of licensed houses for the purpose of letting or subletting them to tenants as tied houses, and of thereby increasing the sale of their beer to such tenants.

It was further proved (see p. 632)

> that (*a*) if brewers were to be included in the area of competition as possible tenants of the premises, though they did not in fact intend themselves to occupy the same, but only to convert such premises into a tied house for the sale therein of their own beer, the rent at which the premises might reasonably be expected to let would be sufficiently high to support a gross estimated rental of from £40 to £45 ; and (*b*) that if such brewers were to be excluded from the area of competition as possible tenants of the premises, and if the said area of competition was to be restricted to such intending tenants as would themselves occupy the premises as ordinary tenants of a free house, the rent at which the premises might reasonably be expected to let would only be sufficiently high to support a gross estimated rental of from £30 to £35.

The assessment committee did not support their valuation of £70, which had evidently been fixed on the basis of a tenancy for a term of years, instead of from year to year as prescribed by the Act, but they maintained that in fixing the valuation at £35 the court of quarter sessions had proceeded upon wrong principles. The rival contentions of the parties were thus set out in the stated case (see pp. 632, 633) :

> 11. The appellant contended that the true test of the net annual value of the premises within the meaning of the Act of 1836 was the rent that an ordinary tenant intending to occupy the premises from year to year as a "free" house for the purpose of carrying on his own retail business as a publican would give, not what a brewer in competition with other brewers would give for the purpose of converting the premises into a "tied" house for the exclusive sale of his (the brewer's) beer, thereby increasing the profits of his own business.
>
> 12. The respondents contended that the net annual value of the licensed premises within the meaning of the Act of 1836 was their value to the owner, and not their value to the tenant in fact occupying the same, and that the premises should be assessed at the value at which they would let to a hypothetical tenant from year to year (all possible competitors who would be willing to take the premises from the owner being taken into account as possible hypothetical tenants), and

> that, therefore, the competition of brewers ought to be taken into consideration, although they did not in fact themselves intend to occupy the premises, and that the area of competition ought not to be restricted to such intending tenants as would themselves occupy the premises in question.

In deciding that the gross estimated rental of the premises should be assessed at £35, the court of quarter sessions held that (see p. 633)

> in arriving at the gross estimated rental and rateable value it was the hereditament, independently of and without reference to any personal contract with brewers, that had to be assessed—in fact, the "free" house, not excluding brewers as competitors, but treating them, like other tenants from year to year, as tenants of an hereditament unfettered by any personal contract . . .

These ample quotations show the nature of the problem as it came before the Divisional Court, and have been rendered necessary in order to comprehend what was there decided. RIDLEY, J., said, at p. 635:

> The hypothetical tenant is to be a tenant supposed to take the hereditament as it stands, and used as it is, so far as the use of the premises goes—that is to say, as a public-house, as ironworks, or a dwelling-house, as the case may be; but, whilst that is true, the value of the hereditament is not to be affected by contracts or conditions not directly bearing on the occupation or use of the property, but of a personal and collateral character. Now, in this present case the contention of the appellant below, as set out in para. 11 of the case, appears to me to be correct according to the rules above-stated. The "ordinary tenant intending to occupy the premises from year to year as a 'free' house" is in the same position as the hypothetical tenant of the statute, and he is willing to give the rent for the premises, not for the business carried on upon them.

Dealing with the respondents' contention in para. 12, RIDLEY, J., interpreted it, at p. 635, as meaning:

> . . . that not only the competition which would be due to the situation and character of the hereditament was to be taken into account, but also the competition of brewers intending to use the premises as a tied house. In so far as this contention introduces into the estimate an element not referable to the rateable hereditament itself, but to some personal or temporary contract under which the business is to be carried on upon it, I think it is clearly wrong.

In his opinion, at p. 636:

> . . . though the competition of brewers was not to be excluded in estimating the rent, they must be treated like other tenants from year to year of an hereditament unfettered by personal contract.

It was suggested that the views expressed by CHANNELL, J., were not entirely consistent with those expressed by his colleague. Thus, RIDLEY, J., in one of the passages above-quoted, says that the contention of the appellant as set out in para. 11 appeared to him to be correct, whereas CHANNELL, J., with reference to the same paragraph, says, at p. 637:

> This contention appears to me not to be precisely correct. It is rather liable to be misunderstood, and I cannot adopt it in the terms in which it is stated, though perhaps there is no substantial inaccuracy.

In the result, however, I do not think that there was any real difference of view between the judges as to the principles which they held to be applicable, although CHANNELL, J., is more explicit in their statement, as shown in the quotations which I am about to give. He says, at pp. 637, 638:

> If in fact there are so many competitors, whether brewers or others, desiring to

> obtain possession of public-houses as to raise the value of public-houses in the district (the number of which is of course limited), that fact necessarily affects the sum which any tenant, whether brewer or not, may reasonably be expected to give ; he will have to give that which the landlord will expect to get from others, or he will not be taken as tenant. I think that any circumstances which affect the annual value in the market must be taken into consideration in arriving at the gross estimated rental –that is, at the sum which may reasonably be expected to be obtained from a tenant from year to year ; and therefore the demand which exists for public-houses, whether by brewers or others, must be considered, for that demand directly affects the value. The contention of the appellant is, however, well-founded, to this extent—any sums which are paid by the tenant, not by reason of the value of the premises, but for reasons personal to himself, ought not to be taken into account.

Again, the judge thus defines his position, at p. 639 :

> . . . where such a demand for houses by brewers exists as to make it reasonable to expect that a landlord could get from anyone a higher rent for his public-house than he would if that demand of the brewers did not exist, then that higher rent is a rent which may reasonably be expected to be obtained for the premises within the meaning of the Act of 1836, and the rating will be higher than if the demand did not exist. I do not think, therefore, that it is right to say that the competition of brewers should be wholly excluded from consideration, but the special prices which they may give, owing to personal considerations, and not on account of the value of the premises, should be excluded except so far as the possibility of such special prices being obtained raises the market value generally. The contention of the respondents, which is stated in para. 12 of the case, appears to me to be correct, subject only to the doubt as to what is meant by the " competition of brewers being taken into consideration." If that means that the question should be considered whether the competition of brewers had raised the market value of public-houses in the district, then, in my opinion, it is right. If, however, it means that the special values which the brewers may, for reasons connected with their own business, be willing to give are to be treated as the gross estimated rental of the premises, because those sums might be obtained from brewers, then, in my opinion, it is wrong.

I have quoted the judges thus extensively both out of respect to their eminence and experience and in my anxiety lest I should seem to do injustice to their views. As I read these passages, I understand the principle which they embody to be that in the letting market for public-houses one is to assume the presence of brewers as bidders, but to exclude consideration of the rents which they would offer. In short, the competition of brewers is to be taken into account quantitatively, but not qualitatively. By their presence in the market they add to the number of competitors, and so tend to increase the rent which will be offered, on the principle that, the more numerous the competitors, the keener the market ; but the rent which the brewers would be prepared to offer must be disregarded, and all the competitors (whether brewers or others) must be regarded as competitors for the tenancy of a public-house which is to be occupied and conducted as a free house. This, your Lordships were given to understand, is how the judgment has been interpreted and applied in practice, and this is how it has been interpreted and applied by the court of quarter sessions in the present case.

I find myself quite unable to accept such a method of valuation. The Rating and Valuation Act, 1925, s. 68 (1), defines " gross value " to mean " the rent at which a hereditament might reasonably be expected to let from year to year," on certain assumptions immaterial for the present purpose. It is not the rent at which the hereditament is actually let, unless that happens to be the rent at which it might reasonably be expected to let. It is the rent which a hypothetical tenant might reasonably be expected to pay. The hypothetical tenant may reasonably be expected to pay the rent which, in the letting market for such premises, would be offered as the result of the competition existing in that market. The valuing authority must gauge both the extent of the competition in the market and the rent likely to be offered and accepted in that market. In the case of a public-house, I can see no justification for including brewers among the competitors but excluding the rent which they would offer. The motives which actuate buyers in a market may be of all kinds, but it is not their motives, but their bids, that matter. In the case of trade premises, the competitors for the tenancy are presumably always actuated by a consideration of the profit which they think they can make by utilising the premises, and they will have this in view when they make their bids. The brewer who wishes the premises because he thinks he can make money by subletting them to a tied tenant is influenced by perfectly legitimate business considerations. He offers the rent which he thinks it worth his while to pay to obtain the tenancy. Why should the rent which he is prepared to pay be excluded from consideration in fixing the market value of the tenancy? He is one of the competitors in the market, and the figure which he is prepared to pay is an element which ought clearly to be taken into account in arriving at the market price.

The reasoning in the judgments in the *Bradford* case (1) appears to me to confuse two quite different things. Where, as between landlord and tenant, personal elements extraneous to the ordinary relation of lessor and lessee are introduced into the contract of tenancy, then the so-called rent paid is not rent in the economic, any more than in the legal, sense. As the phrase goes, there is present a consideration other than the rent. Of this there is no better instance than the so-called rent paid by a tied tenant, for the rent is artificially reduced by reason of the personal restrictions imposed on him. Consequently, the tied rent is properly disregarded in determining what rent the hypothetical tenant might reasonably be expected to pay on ordinary terms. But the rent which a brewer is prepared to pay for the tenancy of a public-house because he sees his way to make a profit for himself by subletting it to a tied tenant is not vitiated by any such consideration as applies between the brewer and his tied tenant. The brewer thinks that he can make a profitable use of the premises by subletting them to a tied tenant, and so is disposed to offer a high price for the tenancy. The object of making a profitable use of the premises is just the ordinary motive which actuates competitors in a letting market. One of the attractions which a public-house offers in the market is the facility of letting it to a tied tenant. As between the brewer and the landlord to whom the brewer makes his offer of tenancy, there is no question of any "personal or temporary contract under which the business is to be carried on " upon the premises, such as the judges in the *Bradford* case (1) rightly say ought to be excluded from consideration. Nor, in taking into account the rent which a brewer would pay, is there any violation of the principle that the valuation must be *rebus sic stantibus*. It is precisely because the hereditament is a public-house, and is to continue to be used as such, that it attracts the brewers' competition.

The unsoundness of the view taken in the *Bradford* case (1) becomes even more manifest when it is sought to apply it to the circumstances of the present case. In the *Bradford* case (1), the brewers were desirous of becoming tenants in order that they might in turn sublet to tied publicans. In the present case, it appears that large numbers of the public-houses in the area, including the White Lion Hotel itself, are occupied by brewers, and managed for them by managers in their employment. The growing practice, apparently, among brewers is to occupy public-houses themselves, and sell their own beer in them through a manager, whom they employ in the premises. Here there can be no question of any personal contract or restriction entering into and vitiating the rent which the brewer is prepared to offer for the tenancy. The case is just the same as that of any manufacturer who rents shops for the retail sale of his goods. Why should the rent which manufacturers are willing to pay not be taken into account, assuming them to be proved to be in the market for shops ?

I may notice, in order to dispose of it, a suggestion that the rent which a brewer would pay ought not to be taken into account for the reason that he is in a position to pay that rent only because he is the owner of another hereditament—namely, his brewery—and that the profit which he has in view is not the profit to arise from occupancy of the public-house, but the enhanced profits of his brewery. It is, however, well-settled that in valuing a hereditament it is legitimate to have in view its importance as an adjunct of another hereditament : *R.* v. *London & North Western Ry. Co.* (2). In the case where the brewer sells his own beer in the public-house which he rents, he no doubt benefits his brewery by having an assured channel for the disposal of his beer, but the profit is actually made where the sales are effected—that is, in the public-house.

While, therefore, evidence as to the rents which brewers would be prepared to pay for the tenancy of a public-house, whether they propose to sublet it to a tied tenant or to occupy it themselves through a manager, is in my opinion both competent and relevant in estimating the rent which a hypothetical tenant of the public-house might reasonably be expected to pay, it by no means follows that the rent which could be obtained from a brewer is necessarily to be taken as the gross annual value. There may not be many brewers in the district looking out for public-houses to let, and the chance which a public-house in the particular locality has of being let to a brewer willing to pay a high rent

may be small. It is for the valuing authority to arrive at their valuation on the whole evidence, including evidence as to the extent of the demand for public-houses in the district, the parties likely to compete for them, whether brewers or others, the rents which these competitors of all classes would be likely to offer, and all other relevant considerations.
A In the present stated case, it will be noted that the figure of £112 is not said to be the rent which a brewer would be willing to pay for the White Lion Hotel, but that the rent at which the hereditament might reasonably be expected to let from year to year would be sufficiently high to support a gross value of £112, if regard be had to the competition between
B brewers and to the rent which a competing brewer, who desired the premises in order to secure the use of them for the sale of beer from his own brewery, might be willing to give. As, on the facts found in this case, it was, in my opinion, proper to have regard to the competition of brewers, and to the rents which they might offer, it follows that the
C figure of £112 ought to be taken as the gross value of the premises.

I do not think that it would serve any useful purpose to examine the numerous cases that were cited in the course of the debate, especially in view of the very exhaustive survey of the authorities undertaken by SCOTT, L.J., in the Court of Appeal. The result of that survey amply
D supports the conclusion at which the court arrived, which also commends itself to me.

It is right, however, that I should notice an argument which was strenuously advanced by the appellants—namely, that, even if your Lordships should be dissatisfied with the soundness of the decision in
E the *Bradford* case (1), this House should not disturb it, in view of the fact that it has stood for 40 years without being overruled, and has regulated practice during that long period. The case is not a favourable one for the application of the doctrine *stare decisis*. The decision on behalf of which it is invoked is both embarrassing and unjust—embarrass-
F ing, because even the experienced counsel who appeared at your Lordships' bar had considerable difficulty in explaining precisely what it decided and what evidence it ruled out, and to valuation authorities it is not likely to be more easy of comprehension; unjust, because the unduly low valuation of public-houses to which it has given rise places
G an unjustifiable burden on the occupiers of other hereditaments. In the recent case of *Westminster City Council* v. *Southern Ry. Co. & W. H. Smith & Son, Ltd.* (3), your Lordships overruled a much more venerable rating decision, and I see no reason why more indulgence should be extended to the *Bradford* case (1). It was also sought to
H found an argument on the principle recently considered by this House in the case of *Barras* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.* (4), to the effect that, where Parliament in re-enacting legislation uses language which has been the subject of judicial interpretation, it must be presumed to have used that language in the sense in which it has been judicially interpreted. I ventured in the case I have just cited

to suggest some obvious limitations of the scope of this doctrine. I recognise that, where a term or expression which has an established judicial connotation occurs in a statute, Parliament may well be taken to have employed it in conformity with this usage, but it would be reducing the doctrine to an absurdity to hold that Parliament, in repeating in the Act of 1925 the general terms used in the Act of 1836 to define annual value, thereby gave Parliamentary sanction to every one of the innumerable and not always consistent decisions on the subject of the hypothetical tenant and the rent which he may be reasonably expected to pay. I am accordingly of opinion on all grounds that the present appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Godden, Holme & Ward* (for the appellants); *Richardson, Sadler & Co.*, agents for *Hannay & Hannay*, South Shields (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* NATIONAL MORTGAGE AND AGENCY CO. OF NEW ZEALAND, LTD.

[House of Lords (Lord Maugham, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan), **February 7, 8, 10, 11, March 17, 1938.**]

Income Tax—Double taxation—Relief—Dominion tax—Allowances and deductions—Tax on debenture interest paid by company but recoverable from debenture holders—Finance Act, 1920 (*c.* 18), *s.* 27—*Finance Act,* 1927 (*c.* 10), *s.* 46, *Sched.* V, *Part* II (2) (i).

A company, incorporated under the Companies Act in England, and controlled in England, carried on in New Zealand a business of lending money on mortgages and short loans. The company occupied certain land in New Zealand for the purposes of its business, and in respect thereof was allowed in New Zealand a special deduction of 5 per cent. from its assessable income. There was a similar special deduction of interest payable on debenture capital employed in the production of the assessable income. In round figures, the United Kingdom assessment was £70,000, of which items amounting to £25,000 were not brought into the New Zealand assessment at all. The remaining items were assessed at £45,000 in the United Kingdom and at £26,000 in New Zealand. The special allowances in respect of land and debenture interest above referred to amounted to £45,000. It was contended for the Crown that, in calculating the income subject to double taxation, this £45,000 should be deducted from the United Kingdom assessment in addition to the £25,000 in respect of items not included in the New Zealand assessment. The company was, however, assessed in respect of the debenture interest under a separate section of the New Zealand statute, which provided that the company was to be the agent of the debenture holders for the purposes of the income tax statute, and assessable in respect of interest paid to them accordingly. The sum so paid was £34,779:—

Held: (i) applying the principle of the decision in the *Assam* case (3), the respondents were entitled to relief on the amount in respect of which they were assessed to United Kingdom income tax, being an amount smaller than that subject to assessment to Dominion income tax.

(ii) no deduction could properly be made in respect of allowances or deductions from the statutory income in New Zealand, so as to reduce the comparative income in the United Kingdom.

(iii) the interest paid in respect of the debentures must be added to the statutory income in New Zealand as forming part of the profits assessable in New Zealand.

Order of Court of Appeal ([1937] 2 All E.R. 20) *affirmed.*

[**EDITORIAL NOTE.** The first point in this case was decided in the *Assam* case (3). The rule is that one has to eliminate from the United Kingdom assessment sources of income not taxed in the Dominion. Having thus arrived at notional figures of the income tax both in the United Kingdom and in the Dominion, relief is granted in respect of the notional income in the Dominion. If this notional figure in the Dominion in respect of income doubly taxed should exceed the United Kingdom figure, then it would appear that relief is due in respect of the latter figure. This figure, however, is to be fixed by the assessable income of the company, and no account may be taken of deductions and allowances from the assessable income. The third point is peculiar to this case, and carries the question of relief from double taxation a stage further. The company had paid tax on the debenture interest, but only as agent for the debenture holders, and had in New Zealand a statutory right of recovery against the debenture holders. It is now held that this debenture interest can be included in the sum in respect of which relief is claimed.

As to Relief from Double Taxation, see HALSBURY, Hailsham Edn., Vol. 17, pp. 323, 324, paras. 642, 643; and for Cases, see DIGEST, Supp., Income Tax, Nos. 557a-557d.]

Cases referred to:

(1) *Indian & General Investment Trust, Ltd.* v. *Borax Consolidated, Ltd.*, [1920] 1 K.B. 539; 11 Digest 387, *640*; 89 L.J.K.B. 252; 122 L.T. 547.

(2) *Inland Revenue Comrs.* v. *Dalgety & Co.*, [1930] A.C. 527; Digest Supp.; 99 L.J.K.B. 342; 143 L.T. 191; 15 Tax Cas. 216; *on appeal from* [1930] 1 K.B. 1.

(3) *Assam Railways & Trading Co., Ltd.* v. *Inland Revenue Comrs.*, [1935] A.C. 445; Digest Supp.; 103 L.J.K.B. 583; 152 L.T. 26; 18 Tax Cas. 509.

(4) *Ashton Gas Co.* v. *A.-G.*, [1906] A.C. 10; 10 Digest 1162, *8225*; 75 L.J.Ch. 1; 93 L.T. 676; *affg.* S.C., [1904] 2 Ch. 621.

(5) *Inland Revenue Comrs.* v. *Blott, Inland Revenue Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 28 Digest 107, *663*; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101.

Appeals from orders of the Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ.), dated Mar. 4, 1937, and reported in [1937] 2 All E.R. 20, allowing appeals by the respondent company from two orders of Finlay, J., dated July 31, 1935. The facts and the arguments are set out in the opinions of Lord Maugham, L.C., and Lord Macmillan.

The Solicitor-General (*Sir Terence O'Connor, K.C.*,) and *Reginald P. Hills* for the appellants.

A. M. Latter, K.C., and *Cyril L. King, K.C.*, for the respondent company.

Lord Maugham, L.C. [read by Lord Atkin]: My Lords, these appeals raise questions upon the true construction and effect of the Finance Act, 1920, s. 27, a difficult section, which has already led to arguments and differences of opinion in the courts, and has more than once come before your Lordships. There are now in fact two appeals from orders of the Court of Appeal dated Mar. 4, 1937, allowing appeals by the respondent company (to be called here " the company ") from two orders of FINLAY, J., dated July 31, 1935. The matters came before the judge, as to one case, by way of case stated from a decision of the commissioners for the special purposes of the Income Tax Acts, and, as to the other, from a decision of the said commissioners. In the first case, the judge reversed their decision; in the second, he affirmed it. The facts have some complexity, and are related to the claims of the company to relief under sect. 27 in respect of the seven income tax years 1924-25 to 1930-31 inclusive. Fortunately, it has been agreed that the facts with regard to the year 1928-29 can be treated as sufficiently illustrating the principles to be observed in applying the provisions of sect. 27; and that agreement was observed in the King's Bench Division and in the Court of Appeal, and was continued in the hearing before your Lordships.

The company is a company incorporated in England under the Companies Act, with an authorised share capital of £1,500,000, of which at the material times £250,000 had been issued and paid up. It has also issued in the United Kingdom debentures at varying rates of interest secured on its uncalled capital. The amount of the debentures outstanding at Sept. 30, 1927, was £782,275 9*s.* 9*d.*, and the amount of the interest paid in the year ending on that date was £39,321 11*s.* 10*d.*

The business of the company in the main consists in lending money in New Zealand on mortgages and short loans. By far the greater part of the company's income arises in New Zealand, chiefly from the interest on these loans. The company owns real property in New Zealand, being premises occupied by it for the purposes of its business. It also had during the relevant years an investment in New Zealand War Loan (specifically exempted from New Zealand income tax), investments in ordinary and preference shares in New Zealand companies, and investments in the United Kingdom the income from which was taxed at source in the United Kingdom. No question arises on this appeal as to the income from the company's investments.

The company, being controlled in England, was taxed to United Kingdom income tax on the whole of its profits, whether arising from its trade in New Zealand or otherwise, under the Income Tax Act, 1918. It was also taxed to New Zealand income tax in New Zealand in respect of its profits arising in New Zealand. Both in the United Kingdom and in New Zealand the tax is computed by reference to the profits of the year preceding the year of assessment—for example, for the assessment year 1928-29, by reference to the company's year ending Sept. 30, 1927.

The section of the Finance Act, 1920, so far as material, and as amended by the Finance Act, 1927, s. 46, Fifth Schedule, Part II (2) (i), runs as follows:

> (1) If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income,

proves to the satisfaction of the special commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows: (*a*) if the Dominion rate of tax does not exceed one half of the appropriate rate of United Kingdom income tax, the rate at which relief is to be given shall be the Dominion rate of tax; (*b*) in any other case the rate at which relief is to be given shall be one half of the appropriate rate of United Kingdom income tax.

A It is clear that the section relates to the statutory incomes in the United Kingdom and in the Dominion—that is, incomes ascertained for a particular year of assessment according to the systems and rules in force in the two countries. The relief afforded is in respect of double taxation, B and is then given as a relief from United Kingdom income tax. It is necessary to prove (i) payment of or liability to pay United Kingdom income tax for a year of assessment on a part of the payer's income, and (ii) payment of Dominion income tax for that year in respect of the same part of his income. This involves the ascertaining of those "parts" C in the two countries, by excluding from the statutory incomes in the two countries items which do not satisfy the conditions according to the true construction of the section. For brevity, I shall call the part in the United Kingdom in regard to which the taxpayer can prove that he has paid Dominion tax in respect of the same part "the United Kingdom D comparative income," and I shall call the similar part in respect of which he has paid New Zealand tax "the New Zealand comparative income." The problems to be solved are the amounts of these two comparative incomes. As will appear later, it is the smaller of the two in respect of which relief is afforded by the section. For the year 1928-29, the E profits of the trade of the company computed for assessment to United Kingdom tax under Sched. D. Case I, were (as adjusted) £70,017. This sum included certain items of income which did not enter into the profits of the trade carried on in New Zealand. It was admitted before your Lordships on behalf of the company that these items, which amounted F altogether to £25,549, must be deducted from the £70,017, leaving (if nothing more ought to be deducted) the sum of £44,468 as the United Kingdom comparative income.

In considering the figure of £70,017 for the purposes of the questions that arise on this appeal, it must be remembered that, according to the G provisions of the Income Tax Act, 1918, the debenture interest paid by the company in Great Britain, amounting to the sum of £39,321 for the year in question, was not deducted in arriving at the amount of the assessment, though the company of course has a right to deduct the tax on payment of the interest to the debenture holders.

H Income tax is imposed in New Zealand by the Land and Income Tax Act, 1923. Your Lordships have thought it necessary to consider all the provisions of this Act, but, for the purposes of making this opinion intelligible, it will be sufficient to set out the relevant parts of the following sections:

73 (1). Income tax shall be assessed and levied on the taxable income of every

taxpayer at such rate or rates as may be fixed from time to time by Acts to be passed for that purpose.

74 (2). "Absentee" means in this part [sects. 72-110] of this Act, a person whose home has not been in New Zealand during any part of the income year.

78. The following incomes shall be exempt from taxation . . . (*g*) dividends and other profits derived from shares or other rights of membership in companies, other than companies which are exempt from income tax.

79 (1). Without in any way limiting the meaning of the term, the assessable income of any person shall for the purposes of this Act be deemed to include, save so far as express provision is made in this Act to the contrary . . . (*g*) all interest, dividends, annuities and pensions.

80 (1). In calculating the assessable income derived by any person from any source no deduction shall be made in respect of any of the following sums or matters . . . (*h*) interest, except so far as the commissioner is satisfied that it is payable on capital employed in the production of the assessable income.

83 (1). When any land in which a taxpayer owns an interest, or any portion of such land, has throughout the income year or any portion thereof been actually used by the taxpayer exclusively for the purposes of his business or for the purpose of deriving rent, royalties, or other profits therefrom, he shall be entitled, by way of special exemption, to deduct from the assessable income derived by him during the income year, so far as derived from such use of the land, a sum computed in respect of the period of such use at the rate of 5 per cent. per annum on the capital value for the time being of his interest in the land or in the portion thereof so actually used by him, as the case may be, and income tax shall be assessed and payable accordingly.

84 (2). Subject to the provisions of this Act, all income derived from New Zealand shall be assessable for income tax, whether the person deriving that income is resident in New Zealand or elsewhere.

(3) Subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income tax.

99 (2). If the commissioner is satisfied with respect to the holder of any debenture or debentures issued by any local or public authority or by any company that the aggregate amount of income tax paid or payable by or on behalf of the debenture holder (including the tax paid in respect of interest on debentures) exceeds the amount of tax that would have been payable by him if the interest received by him on those debentures had formed part of his taxable income, the commissioner shall, on application by the taxpayer, pay to him the amount of the excess.

111. In this part of this Act [sects. 111-132] the term "absentee" means (*a*) any person (other than a company) who is for the time being out of New Zealand.

116 (1). Save as otherwise provided in the next succeeding section, every company which has issued debentures, whether charged on the property of the company or not, shall for the purposes of this Act be the agent of all debenture holders, whether absentees or not, in respect of all income derived by them from those debentures, and shall make returns, and be assessable and liable for income tax on that income accordingly. (2) No deduction by way of special exemption or otherwise shall be allowed to the company as such agent, or to any debenture holders, in respect of the income so derived from debentures. (3) Income so derived by debenture holders in companies shall be assessable and chargeable with income tax separately from income derived by the debenture holders from other sources, and at the rate prescribed by the annual taxing Act as appropriate to income so derived. (4) Income derived from debentures held by a banking company shall not be liable to income tax under this section.

126 (1). Every agent shall be personally liable for the tax on the land or income in respect of which he is an agent.

127. Every agent shall make returns of the land and income in respect of which he is an agent, and shall be assessed thereon in the same manner as if he was the principal, save that he shall be entitled to no special exemption other than such exemption (if any) as his principal may be entitled to.

130. When an agent pays any tax he may recover the amount so paid from his principal, or may deduct the amount from any moneys in his hands belonging or payable to his principal.

In computing the assessable income of the company in New Zealand, a deduction had been allowed (sect. 80 (*h*)) for the interest on so much of the debenture capital as had been employed in the production of the assessable income—namely, the sum of £34,779. A special exemption was allowed under sect. 83, amounting to £9,998. The dividends from New Zealand companies, the interest on New Zealand War Loan, and certain income earned in the United Kingdom, were also excluded.

The company was accordingly assessed to tax in New Zealand in respect of its business and assets there in the sum of £26,592, after making all the various deductions and exemptions above referred to. It was, however, also bound under sect. 116 to make returns, and it was made liable to pay, and has paid, income tax " in respect of all income derived by " the debenture holders from all the debentures it had issued. This is expressly stated in sect. 116 to be done " as agent of all debenture holders, whether absentees or not." These persons, however, hold debentures registered in Great Britain, which in fact do not confer a charge on any property in New Zealand. It is not in dispute that the holders, or most of them, reside in Great Britain, and that they could not therefore be directly liable to pay income tax under a New Zealand statute which is necessarily subject to well-known territorial limitations. Moreover, for another reason the company is unable to rely on sect. 130 of the New Zealand Act. The interest on the debentures is payable under a contract made in the United Kingdom, and to be performed here, and the company, as is indeed admitted, will be unable to recover from its debenture holders the tax which it has paid in respect of the income due on the debentures: see para. 9 of the case stated, and *Indian & General Investment Trust, Ltd.* v. *Borax Consolidated, Ltd.* (1). The question then arises: is the New Zealand comparative income £26,592, or ought it to include the debenture interest assessed and paid by the company under sect. 116, which appears to be (as adjusted) the sum of £33,609, making the total sum of £60,201 ?

The United Kingdom statutory income, as already stated, was £70,017. The items which it is now admitted must be deducted were in respect of: (i) dividends on preference shares in a New Zealand company, called in the case for convenience " X," which the respondent company received, and from which no New Zealand tax was deducted, and which under the New Zealand Act was excluded from assessable income of the company (£1,500); (ii) interest on New Zealand War Loan, which is specifically exempted from tax under the New Zealand Act (£860); (iii) dividends on ordinary shares in the company " X " (£19,758); (iv) profits earned in the United Kingdom (£3,431). These items, which amount to £25,549, were deductible as not having been taxed in New Zealand, so that the taxpayer has not " paid Dominion income tax for that year in respect of " those items. This would leave the sum of £44,468 as the United Kingdom comparative income. The Crown, however, contends, on the grounds to be next stated, that the sum of £9,998, the 5 per cent. unimproved value of the land specially exempt under sect. 83 of the New Zealand Act, should also be deducted from the £44,468, thus reducing the United Kingdom comparative income to £34,470. The question here is whether that contention is correct.

My Lords, two points of principle have been argued in this House on behalf of the Crown. First, it is contended that it is necessary for the purposes of sect. 27 to investigate the component elements of the income as computed and assessed under the taxing Act of each country, and to eliminate elements not common to each system of taxation, i.e., elements which, not being included in the income as computed for the tax of each country, had not been the subject-matter of taxation by the law of each country. By this contention, it is sought to deduct the sum of £9,998 from the United Kingdom comparative income. Secondly, it is contended that the interest paid to the debenture holders was their income, for which the company has been taxed as agent for those debenture holders, and that the income in question does not fall within the expression " his income " in sect. 27 (1). If this contention were to prevail, the (adjusted) sum of £33,009 (paid in respect of debenture interest) could not be treated as part of the income of the company in New Zealand in respect of which it has paid income tax, and therefore could not be added for the purposes of sect. 27 to the company's statutory income in New Zealand (£26,592).

The Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ.), has decided both contentions against the commissioners—that is, in favour of the company—and your Lordships have had the advantage of some interesting arguments on both points.

Sect. 27 has been under consideration in this House on two occasions, first, in *Inland Revenue Comrs.* v. *Dalgety & Co.* (2), and secondly, in *Assam Railways and Trading Co., Ltd.* v. *Commissioners of Inland Revenue* (3). In the *Dalgety* case (2), the company, which was incorporated in England, carried on a trade mainly in Australia and New Zealand. It had issued debentures charging its total assets with payment of principal and interest, and in paying the interest on them in this country had deducted (under All Schedules Rules, r. 19) the full amount of the United Kingdom income tax in respect of the interest. The question in dispute was whether, for the purposes of relief under sect. 27, the amount of relief was to be calculated on (*a*) the whole of the profits earned by the company in the Dominions, or only on (*b*) the balance of such profits remaining, after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom. It was agreed that the debenture interest should be regarded as paid out of income arising in the United Kingdom, so far as that would suffice to meet it. It was stated that the company paid the Dominion income tax, including that part which was applied in payment of debenture interest, and had not recovered any part of that tax by deduction or otherwise from the debenture holders. (No evidence appears to have been given as to the New Zealand Act, 1916 (No. 5), s. 112, which was in similar terms to those of sect. 116 of the Act of 1923). It was recognised that, if the claim of the company were allowed in full, it would receive back a sum which would cause the amount of profits distributed by way of dividend to escape the full burden of tax measured in terms of the rate imposed in the United Kingdom. Nevertheless, it was held that, upon the true construction A of the section, the company was entitled to succeed. There is a passage in the opinion of LORD BUCKMASTER, which may be cited as throwing some light on the present case. He said, at p. 531:

> Taking the words [of the section] in order, there can be no doubt the company did pay "United Kingdom income tax" on the full amount. "The income tax charged B in accordance with the provisions of the Income Tax Acts" was charged on the whole of its profits and gains. Nothing less would have been accepted and no other person was liable to make the payment. But it is urged that even if this be accepted, to the extent of the debenture interest the payment was made on behalf of the debenture holders. To this extent that is true—namely, that, having paid, the company was entitled to deduct the tax from the debenture interest, and to the extent of that deduction, it was the debenture holders' tax that was thus discharged. But it was not the debenture holders who made the payment but the company.

C LORD WARRINGTON OF CLYFFE, at p. 536, put the same conclusion in other words when he said that the contention of the Crown required the words of the section to be read in a sense other than their ordinary and natural meaning, as, for example, "paid" must be read "paid D and ultimately borne." LORD THANKERTON used substantially the same phrase (p. 539). LORD MACMILLAN observed, at p. 542:

> Actual payment, not ultimate incidence, is the criterion both of the right to relief and of the right to deduct.

It should be explained that nothing turns as a matter of principle on E the fact that it had been agreed in the Court of Appeal that the debenture interest should be regarded as paid out of income arising in the United Kingdom, so far as there was such income available for the purpose. As appears from the figures at pp. 3, 4 of that report, that was apparently done in the case stated only for the purpose of preventing a claim for F relief in respect of items of income arising solely in the United Kingdom.

My Lords, I do not think it necessary to explain in detail the facts proved and the contentions dealt with in the *Assam* case (3), for that has already been done in the judgment of ROMER, L.J., in this case in the Court of Appeal, at p. 30: I agree in all respects with his view as G to the conclusions established in that case in this House:

> (i) that the word "income" in the section does not mean the real income, but the "statutory" or "notional income," by means of which the tax is calculated; (ii) that if this statutory income in the Dominion is £A, and in the United Kingdom the statutory income from the same source is £(A+B), relief will be given in respect of £A; (iii) that an analysis of the two statutory incomes, for the purpose of com- H paring, for example, the respective allowances for repairs or depreciation, is inadmissible.

He adds later on, at p. 31:

> Nothing need be regarded except the two statutory incomes of the business, taking care, of course, to see that neither includes income from any other source. Relief will then be given to the extent of the smaller of the two sums without inquiry into the reasons for the difference between them.

In the light of these two authoritative decisions, the contentions in this case on behalf of the Crown, as above stated, can now be considered. Taking first the dispute as to the abatement of partial exemption in respect of land in New Zealand used for the purposes of the company's business (£9,998), it is difficult to see how this item is in a different position from that of allowances for repairs, or for wear and tear, or for bad debts. As was pointed out by Greene, L.J., at p. 33 :

> It must have been present to the mind of the legislature that uniformity in the method of assessing business profits is not to be found throughout the Empire.

It is only necessary to read through the 13 clauses of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 3, to see how arbitrary are some of the provisions as regards deduction from profits and gains to be charged, and how improbable an event it would be to find the same clauses in force in the Dominions. The reasons given in the *Assam* case (3), as well as the reasons given by Romer and Greene, L.JJ., are sufficient to show that rules which determine in the United Kingdom or in a Dominion the allowances or deductions which are permissible for the purposes of assessing a taxpayer to income tax in either country must be disregarded in determining the comparable incomes in those countries, provided that the incomes are derived from the same source : (see the opinion of Lord Wright in the *Assam* case (3), at p. 459).

To avoid misunderstanding, it should be added that there might be an exemption granted by a Dominion Act relating to income tax which justified the inference that certain specific property used for the business was not being taxed at all in the Dominion. Such an exemption would require special consideration, and I need not express an opinion in regard to it. Nor am I dealing here with income from a separate source in the Dominion which is not taxed in the Dominion. In the present case, the allowance we are called upon to consider is, I think, clearly within the principle laid down in the *Assam* case (3). The allowance is one granted as an allowance or deduction for the purpose of ascertaining the statutory amount of the assessable income of the business in New Zealand. The source of the income is the business. No analysis of the component elements of the income, so far as permissible allowances or deductions are concerned, is therefore called for. The land in question is taxed in New Zealand, in so far as it is an important factor in producing the profits and gains of the business, and we are not concerned, for the purposes of the section, with the special exemption given by sect. 83. In my opinion, therefore, the claim of the Crown to deduct £9,998 in respect of this item, so as to reduce the United Kingdom comparative income, fails, and that income must be taken, assuming that the figures above-mentioned are correct, to be £44,468.

There remains the question of the debenture interest. The contention of the Crown here is largely rested on the argument that the income in question is not that of the company, and that tax upon it has been assessed upon the company (under sect. 116 of the New Zealand Act) only as agent of the debenture holders. This argument was, I think, rather lightly brushed aside in the Court of Appeal, but your Lordships have thought it right carefully to consider the provisions of the Land and Income Tax Act, 1923, in order to see whether there was substance in the argument based on agency. It has been noted that there are in A each annual taxing Act in New Zealand special rates prescribed for taxing income derived by debenture holders in companies, and that these rates vary in accordance with the incomes received by the debenture holders from the debentures held by them. This circumstance tends to support the argument that the company is only being taxed as agent. As I B understand the judgments in the Court of Appeal on this point, their conclusion on it would be the same as it was even if the debentures had been issued in New Zealand, and, the interest being payable there, the company had deducted the whole of the tax in respect of the debenture interest. This may be the right view, but it does not seem to me to be C necessary at the present time to decide the case on that ground. In the circumstances, I have suggested that it might perhaps be a true conclusion to draw from the New Zealand Act that the tax paid there in respect of the interest on the debentures was not tax in respect of the company's income, and so not within the words of the section "has D paid Dominion income tax . . . in respect of the same part of his income," giving due emphasis to the possessive pronoun.

In the present case, the circumstances are different from those I have suggested. There cannot be a real agency without a principal, and I am unable to see how the company can be in any true sense an agent to pay E tax for debenture holders who are not liable to pay it. The company has been allowed under sect. 80 (*h*) to deduct the amount of the interest on debenture capital employed in the production of assessable income from such income, but it is liable under sect. 116 of the same Act to pay income tax on the amount of the interest payable on all the debentures, F and that in a case where the company cannot recover according to our law, which must apply here, any part of the tax so paid. My Lords, I am of opinion that the argument based on agency fails, and that in such a case the interest paid in respect of the debentures under sect. 116 must be added to the company's statutory income in New Zealand (£26,592) G as forming part of the profits assessable in New Zealand. I come to this conclusion on substantially the same grounds as those which actuated this House in the *Dalgety* case (2). The tax paid on the interest in question was paid in New Zealand, and also ultimately borne by the company, and it was so paid in respect of the company's income. There H is no other person receiving income on whose behalf it could have been paid. Accordingly, the New Zealand comparative income must be taken to be £26,592 plus £33,609, making a total of £60,201.

If these figures are correct, and if there were not, as we are told that there are, certain further subsidiary matters to be considered, the result would be that the United Kingdom comparative income would be £44,468 and the New Zealand comparative income would be £60,201, with the consequence that the smaller sum would be that in respect of which (as explained in the *Assam* case (3)) relief could be afforded under the section. We are, however, not concerned with figures, but with the principles stated in the judgments of the Court of Appeal. With these principles, subject to a slight difference of opinion as to the ground on which the A question of the debenture interest should preferably be decided, I entirely agree. The appeal should, I think, be dismissed with costs, but it will probably be right to modify the language of the order of the Court of Appeal by adding to the words " in accordance with the judgments of the court " (after the order remitting the matter to the commissioners) B the words " and of this House."

Lord Atkin : My Lords, I concur in the opinion which I have just read.

Lord Thankerton : My Lords, I also concur in the opinion of my C noble and learned friend **Lord Maugham**, L.C., and with regard to his opinion on the debenture interest question I also desire to reserve my opinion on the wider ground to which he has referred, and to confine myself to the facts of this present case.

Lord Russell of Killowen : My Lords, I agree. D

Lord Macmillan : My Lords, in the fiscal year 1928/29, the respondent company paid income tax both in the United Kingdom and in the Dominion of New Zealand. The question is to what extent this fact entitles them to relief from United Kingdom income tax under the E Finance Act, 1920, s. 27.

It is a condition of relief under that section that the taxpayer shall have paid tax both in the United Kingdom and in the Dominion in respect of the same part of his income and for the same year. In the present case, no question arises as to the identity of the year of charge. Both here F and in the Dominion the respondents were taxed in the same fiscal year—1928/29—on the basis of their accounts for their own financial year to Sept. 30, 1927. The computation of their statutory income for tax purposes in both countries was thus based on the same set of figures. However, the methods of computation of income for tax purposes, and G in particular the permissible deductions, differ materially in the United Kingdom and in New Zealand. Consequently, starting from the same figures, the assessing authorities in this country and those in the Dominion arrived at different sums as representing the statutory assessable income of the respondents in their respective jurisdictions. Hence arises the H problem of ascertaining the common fund which is to be taken as having been taxed in both countries.

As regards the United Kingdom, the profits of the respondents' business were assessed here for 1928/29 at £70,017. The respondents did not maintain at your Lordships' bar that they could claim relief in respect of the whole of this sum as having also borne tax in New Zealand. They conceded that it must be reduced to £44,468, by deducting certain profits made in the United Kingdom and not included in the New Zealand assessment, and also certain items not taxed in New Zealand. Then, as regards New Zealand, the result of applying the methods of computation prescribed by the Land and Income Tax Act of that Dominion was to bring out an assessable income of only £26,592. The difference between the results of the two methods of computation was chiefly accounted for by the fact that in the United Kingdom interest paid on debentures is not a permissible deduction, while in New Zealand such interest is deductible if payable on capital employed in the production of the assessable income. This item, deducted in the New Zealand computation, amounted to £33,609, and the main controversy in the present appeal was concerned with the question of its true position in law.

I have said that this debenture interest was, under the New Zealand Act, deductible in computing the respondents' assessable income in the Dominion, but that is not the whole story. The Act, after permitting the deduction of debenture interest, goes on to provide that every company which has issued debentures shall be the agent of all the debenture holders in respect of all income derived by them from those debentures, and shall make returns, and be assessable and liable, for income tax on that income accordingly. Subsequent sections render every agent personally liable for the tax on income in respect of which he is an agent, and entitle him to recover the amount of the tax paid from his principal, either directly or by deduction from any moneys in his hands belonging to or payable to his principal. The tax which the company has to pay as agent is calculated on the basis of the tax payable by the recipients of the debenture interest. While, therefore, the respondents' assessable income was reduced to £26,592 by the deduction, *inter alia*, of £33,609 of debenture interest, they were nevertheless served with a separate notice assessing them for income tax on this latter sum in precisely the same terms as those of the notice of assessment in respect of the £26,592, except that the words "as agent for debenture holders" were written below the amount brought out as due.

The respondents duly paid, as they were in law bound to pay, the amounts of tax brought out in both notices of assessments. The question is whether they can be said to have paid Dominion income tax on the £33,609 of debenture interest within the meaning of the Finance Act, 1920, s. 27. In my opinion, they can. It is true that the theory of the New Zealand Act seems to be that the debenture interest is to be regarded as income of the recipients, and that the company is to be regarded as their agent in paying the tax, but this artificial method of treating the debenture interest, no doubt devised for administrative reasons, does not alter the substance of the matter. It remains true that the money applied in payment of the debenture interest is part of the revenue of the company, and that they are assessable and liable for tax on it. They

have to pay the tax in any event, and, so far as the financial effect is concerned, the only difference between the tax which they pay as principal and the tax which they pay as agent is that they are given a right of recovery from the debenture holders of the tax paid on the debenture interest. In the United Kingdom, however, a company, on paying its debenture interest, is also entitled to deduct tax, and so recoup A
itself. Nevertheless, the company, notwithstanding this right of recoupment, is held to have paid United Kingdom income tax on the amount of its debenture interest within the meaning of the Finance Act, 1920, s. 27. The right of recoupment conferred by the New Zealand Act on the company, which pays tax "as agent" on the debenture interest B
which it pays to its debenture holders, is similarly, in my opinion, irrelevant for the present purpose. If I may quote my own words in *Inland Revenue Commissioners* v. *Dalgety & Co.* (2), at p. 542:

> Actual payment, not ultimate incidence, is the criterion both of the right of relief and of the right to deduct. C

Between the United Kingdom system and the New Zealand system there is really only a difference of method. In the United Kingdom, the debenture interest is not deductible, and is assessed along with the rest of the company's income, but the company is entitled to recover the tax from the recipients. In New Zealand, the debenture interest is deductible, D
but is nevertheless assessed to tax separately in the company's hands, the company being entitled to recoup itself from the debenture holders for the tax paid. In substance, the result is the same, with this difference only, that the rate of tax on the debenture interest is calculated in New Zealand on the basis of the recipients' liability. The principle E
of sect. 27 is that the same fund of income shall not bear the full burden of both United Kingdom and Dominion income tax, and in the present instance it is clear that the £33,609 of debenture interest has, both here and in New Zealand, been subjected, though under different schemes, to the full burden of income tax. I may remind your Lordships that the F
view was at one time taken in this country by high authorities that a company paying income tax on its profits did so as agent for its shareholders: *Ashton Gas Co.* v. *A.-G.* (4) and *Inland Revenue Commissioners* v. *Blott* (5), per Viscount Cave, at p. 201.

I have not hitherto adverted to the circumstance that in this particular G
case the respondents are unable in fact to exercise the right of recoupment conferred on them by the New Zealand statute, and consequently cannot reimburse themselves for the tax which they have paid "as agents," inasmuch as the contracts under which the interest was payable were made in the United Kingdom. Thus, ultimately as well as primarily, H
the burden of the New Zealand tax rests upon them. I understand that your Lordships regard this special circumstance as affording the most satisfactory ground for holding that the respondents' claim to relief has been justified, without finding it necessary to adopt in this case the more general ground which has commended itself to me. The result, whether

the broader or the narrower ground is taken, is fortunately the same, so far as the present appeals are concerned. Accordingly, I think that, for the purposes of sect. 27, the respondents should be taken to have paid United Kingdom income tax on £44,468 and Dominion income tax on £26,592 plus £33,609—that is, £60,201. Applying the principle of the A decision in the *Assam* case (3), I should find that the respondents are entitled to relief in respect of £44,468, being the part of their income which has borne both taxes.

I have dealt only with the single year 1928/29, although the appeals relate to a series of years, for the considerations applying to the other B years are the same. Also, I have confined my observations to the question of the debenture interest, for the reason that, on the other topics which have been raised, I have not felt that I could usefully add anything to the full and adequate treatment which they have received in the opinion of LORD MAUGHAM, L.C., which I have had the advantage of reading in C print. I agree that the appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Freshfields, Leese & Munns* (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

D

WORKINGTON HARBOUR & DOCK BOARD *v.* TRADE INDEMNITY CO., LTD. (No. 2).

E [HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Maugham), **February 11, 14, 15, March 15, 1938.**]

Building Contract—Contract for construction of dock—Guarantee—Default by contractor—Action against guarantor—Engineer's certificate—Action dismissed—Second action claiming loss caused by delay—Res judicata— F *Actions on Breaches on Bonds Act*, 1696 (*c.* 11), *s.* 8.

A firm of contractors agreed to construct a new and enlarged dock. The defendant company gave the dock board a bond in the sum of £50,000 to guarantee the performance of the contract. The contractors defaulted, and the dock board brought an action against the defendant company upon the bond. They relied upon an engineer's certificate G showing that the contractors owed them £78,000, which they had failed to pay. The action was dismissed. The dock board then started a second action, claiming damages caused by delay, owing to the contractors not having proceeded with due diligence and expedition. The defendant company applied to have the proceedings stayed, on the ground that the same matter had already been finally settled in the first action:—

HELD: as the second action was based on precisely the same breaches H as those in the first action, and claimed the same damages, although supported by different evidence, a plea of *res judicata* would succeed, and the second action ought therefore to be dismissed.

Order of Court of Appeal ([1937] 3 All E.R. 139) *affirmed.*

[EDITORIAL NOTE. While it is possible to bring a second action upon a bond if the breaches alleged differ from those in a previous action, any action founded upon what are shown to be the same breaches must fail.

AS TO *RES JUDICATA*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 415-419, paras. 470-472; and FOR CASES, see DIGEST, Vol. 21, pp. 201-205, Nos. 448-471.]

APPEAL from an order of the Court of Appeal (GREER and SLESSER, L.JJ., MACKINNON, L.J., dissenting), dated May 25, 1937, and reported in [1937] 3 All E.R. 139, reversing the decision of LEWIS, J., in chambers, dated Apr. 29, 1937, and restoring the order of Master SIMNER and A ordering that the action which had been commenced by the appellants should be dismissed with costs. The facts and the arguments are set out in the opinion of LORD ATKIN, and the earlier action is reported in [1936] 1 All E.R. 454.

B

Rt. Hon. Sir William Jowitt, K.C., N. L. C. Macaskie, K.C., Arnold Inman, K.C., and *Lawrence Mead* for the appellants.

Hon. Sir Stafford Cripps, K.C., Sir Walter Monckton, K.C., F. R. Evershed, K.C., and *H. J. Astell Burt* for the respondents.

C

LORD ATKIN: My Lords, the question in this appeal is whether the issues raised in this action were not finally determined in a former action between the same parties commenced by writ issued Mar. 4, 1932, and decided by this House on Feb. 11, 1936, when judgment was directed to be entered for the defendant. The present action was commenced D by writ issued July 24, 1936, and, after statement of claim delivered, the defendants took out the summons upon which the case comes before this House, asking that the action be dismissed on the ground that it was frivolous and vexatious, and supporting the summons by an affidavit of the defendants' solicitor stating that the cause of action was the same E as that in the former action. In a case like the present, where the objection to the proceeding is one that can properly be raised by a plea in bar such as *res judicata*, it seems to me that the more correct procedure would be for the defendant to deliver his defence, and, if desired, to set down the point of law raised by the plea of *res judicata* to be heard as a F preliminary point. It seems anomalous that, where there may be a reasonable doubt, an important point of law should fall to be determined in the first instance by a master, and on appeal by a judge sitting in chambers and not in court. However, the question has been fully argued in the Court of Appeal and in this House, and your Lordships would G not think it right at this stage to dispose of the case on a mere question of procedure. I therefore proceed to deal with the point of substance.

The first action was brought by the present plaintiffs upon a bond given by the present defendants guaranteeing the performance by Kirk & Randall, Ltd., of a contract by which they undertook to build H a dock at Workington for the plaintiff board. The construction contract was dated Oct. 23, 1922. By its terms, Kirk & Randall, Ltd., the contractors, undertook to construct, complete and maintain the works described in the general conditions, specification and drawings annexed, subject to and in accordance with the general conditions. The consideration for the whole of the works and obligations undertaken by them was to be such sum as should be ascertained and certified in writing by the engineers according to a schedule of prices. The annexed general conditions comprised 112 clauses of the kind to be found in such construction contracts, defining the obligations of the contractor and the rights of the building owners in respect of the various stages of the work. In particular, it was provided by cl. 50 that the contractor should proceed with the works with diligence and expedition: by cl. 53 that the contractor should complete the works within 30 months from the commencement, unless the time was extended by the engineers: by cl. 56 that the contractor should pay £500 for every week's delay over the stipulated time: and by cl. 57 that this obligation should exist though the prescribed time ceased to be binding. By cl. 85, upon the certificate of the engineers that the contractor had made default in the performance of any of his obligations under the contract, or that he was not proceeding with the works with diligence and expedition the owners might enter into possession of the works. Cl. 86 provided for the consequences of such an entry, and contained subcl. (6), by which the engineers were to ascertain the value of the works constructed at the date of entry, the cost of completion, and sums due from the contractor, including the sum payable for delay, and their certificate showing the balance due or payable by either contractors or owners was to be final and binding on both. It is necessary to mention cl. 106, which contains the provision that any certificate of the engineers should be final and binding upon the contractor, but, as held in the House in the first case, this applies only to certificates in respect of claims by the contractor against the building owner. It is also relevant to state that in Apr., 1924, and Oct., 1925, the contractors obtained from the owners pursuant to the provision of the Trade Facilities Act, 1921, advances of £20,000 and £25,000 with a provision in the agreements that the sums should be repaid by deductions from the contract sums periodically payable under certificate. In order to secure performance of this contract, the board required the contractors to obtain a guarantee up to £50,000, and in consequence the bond was executed, dated Oct. 11, 1922, upon which both actions were brought. By the bond, the Trade Indemnity Co., Ltd., and the contractors are bound to the harbour board in the sum of £50,000, and the condition of the bond, after reciting the construction contract and incorporating it into the bond, states the condition to be that, if the contractors shall execute, construct, complete and maintain the works, and in all things observe all the clauses and conditions of the contract, the bond is to be null and void. Otherwise it is to be of full effect. It contains an express provision that the surety shall be bound by certificate of the engineers under cll. 106 and 107 of the contract, as the contractors are so bound. The contractors commenced work under the contract in 1922, but it was soon apparent that they had miscalculated the cost of dealing with the water on the site. They got into financial difficulties, and on Feb. 19, 1926, the engineers issued a certificate that the contractors were in default in the performance of their obligations under the contract in the following respects—namely, they were not proceeding with the work with diligence and expedition, and had not sufficient labour on the works. The harbour board thereupon entered and completed the works. On Jan. 8, 1932, the engineers issued a certificate entitled final certificate, by which, " in exercise of the powers vested in us by the general conditions," they certified that, on the final settlement of accounts, there was due from the contractors to the board the sum of £78,785 14*s*. 7*d*.

On Mar. 4, 1932, the harbour board issued a writ against the Trade Indemnity Co. It was specially indorsed with a statement of claim as follows :

> The plaintiffs claim the sum of £50,000 as payable under a contract bond dated Oct. 11, 1922, entered into by the defendants (as sureties) with the plaintiffs, to secure the due performance of a contract entered into by Kirk & Randall, Ltd. (hereinafter called " the contractors ") with the plaintiffs for the extension of the Lonsdale Dock (now known as " The Prince of Wales Dock ") at Workington in the county of Cumberland. The contractors made default in the performance of their contract, and in consequence under the conditions of the contract the plaintiffs took possession and completed the works. Messrs. Rendel, Palmer & Tritton, the engineers under the contract, made their final certificate dated Jan. 8, 1932, certifying under the conditions of the contract the indebtedness of the contractors to the plaintiffs in the sum of £78,785 14*s*. 7*d*. Payment of this sum has been demanded from the contractors, but they failed to pay the same. Particulars: 1932, Mar. 4. To amount due under the above-mentioned contract bond: £50,000.

The defendants appear to have made repeated applications for particulars of the default in the performance of the contract alleged. First by letter of Mar. 14, 1932. The answer on Mar. 15 was that the default was certified by the engineers by their certificate dated Feb. 19, 1926, and full particulars of this default were notified to the defendants by letter of Feb. 19, 1926. Next by summons dated Mar. 24, 1932, on which the master made no order. Then by summons dated July 22, 1932, on which, the plaintiffs by their counsel stating that the plaintiffs were unable to supply any particulars other than those already given, it was ordered that the application for particulars should stand over generally. The defence of the defendants raised several points : (i) that they were not bound by this certificate of the engineers at all, (ii) that the certificate in respect of which the action was brought included sums due in respect of advances for which the defendants were in no case liable, and (iii) that the bond was in the nature of insurance and was void for non-disclosure, and that, if it were a guarantee, and not insurance, it was void on the same principle. The trial judge found that the bond was void for non-disclosure, and he also held that the insertion in the certified amount of sums due on the advances vitiated it as against the defendants. On appeal, the Court of Appeal found that there was no non-disclosure, that the certificate bound the defendants, and that it made no difference that it included sums due for advances. On appeal to this House, it was held that the bond was not void for non-disclosure, but that the certificate was not binding under condition 106, as had been alleged, that, as it included unascertained sums in respect of advances, it was not binding on the defendants, and that, as there was no other evidence of loss suffered by the contractor's breach of the building contract, there must be judgment for the defendants. This decision was given on Feb. 11, 1936. On July 24, 1936, the harbour board commenced a second action against the Trade Indemnity Co., which is the action now before this House. By their statement of claim, delivered on July 27, 1936, they set out the bond, and allege that the contractors in breach of the contract (*a*) did not proceed with diligence and expedition (para. 3) and (*b*) did not complete within the contract time as extended (para. 6). They claimed that they had suffered loss for such breaches in alternative sums, under the engineers' certificate, or as liquidated damages, or as general damages, and claimed under the bond £50,000, or, alternatively, £40,364. The defendants on Oct. 13, 1936, took out the present summons asking that the action be dismissed, supporting it by an affidavit of their solicitors that the cause of action was the same as that in the former action. Master Simner accepted this view, and ordered the action to be dismissed. On appeal, Lewis, J., set aside the order, and on further appeal the Court of Appeal reversed the order of the judge and restored the master's order.

My Lords, both actions were brought on the money bond. It is well established that in such an action the plaintiff has to establish damages occasioned by the breach or breaches of the conditions, and, if he succeeds, he recovers judgment on the whole amount of the bond, but can only issue execution for the amount of the damages proved. In such a case, the judgment remains as security for the recovery of damages for other future breaches not sustained at the date of the commencement of the first action. He can suggest the future breaches under a *scieri facias* which makes the existing judgment effective in respect of the further damages proved. It is, I think, plain that, if the plaintiff succeeds in establishing a single breach or breaches in his first action, and has got judgment for the full amount of the bond accordingly, there is no procedure under which he can assign or suggest breaches which are not future breaches, but existed at the date of the first action. I will assume, however, that, though in the first action he has sued for the amount of the bond and failed, so that judgment on the debt has been given for the defendant, yet, if he can suggest another and a separate breach, he may sue again on the bond, though the breach existed at the date of the first action—in other words, that it makes a difference whether he succeeds in the first action or fails. The question will always be open whether the second action is for the same breach or breaches as the first, in which case the ordinary principles governing the plea of *res judicata* will prevail. In the present case, in my opinion, the plaintiffs are suing on precisely the same breaches as those in the first action, and for the same damages, though on different evidence. The first action alleged that the bond was given "to secure the due performance of the contract," that the contractors "made default in the performance of the contract," and that the engineers certified under the conditions of the contract the indebtedness to the plaintiffs in the sum of £78,785 14*s.* 7*d.* I am satisfied that the first action raised the issue of all the contractors' breaches, and treated, and meant to treat, the engineers' certificate as conclusive proof of both the breaches and the losses arising therefrom. Indeed, the certificate as relied on would have had no meaning unless it had comprised exactly what I have said. The allegation in the statement of claim that payment had been demanded from the contractors but they had failed to pay is not—as, with respect, Greer, L.J., mistakenly thought in the first action—an allegation of breach of condition by the contractors making the amount of the bond due, but the ordinary allegation against a surety that the principal debtor has not paid and that the surety is now called on to pay. I think this view is fortified by the fact that, when the certificate of the engineers for £78,785 was obtained, the plaintiffs did not wait for default in payment by the contractors (they were in fact in liquidation), but on the same day wrote to both the contractors and the defendants for payment. However that may be, the issues in the first action appear to cover every breach by the contractors, and all the damage suffered by the harbour board in consequence, and are therefore precisely the same as those in the second action, which therefore must fail. The result is that the plaintiffs, who appear to have had a good cause of action for a considerable sum of money, fail to obtain it, and on what may appear to be technical grounds. Reluctant, however, as a judge may be to fail to give effect to substantial merits, he has to keep in mind principles established for the protection of litigants from oppressive proceedings. There are solid merits behind the maxim *nemo bis vexari debet pro eadem causa.* In the present case, the plaintiffs were warned over and over again in the first action that the defendants contended that they were not bound by the engineers' certificate. The plaintiffs chose (and, in view of the complexity and expense relating to the various alleged breaches, no one can call them unreasonable) to take the risk, and to adhere to the certificate as the only necessary proof. They failed, and the consequence is inevitable. As I think that the defendants show that a plea of *res judicata* would succeed, it has been unnecessary to consider the further objection that the present action raises matter which might have been included in the former action but was omitted. I prefer to say nothing on this point. I agree with the decision of the Court of Appeal, and am of opinion that this appeal should be dismissed with costs.

Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Maugham concurred.

Solicitors: *Johnson, Weatherall, Sturt & Hardy* (for the appellants); *Wedlake, Letts & Birds* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

TALLENT *v.* COLDWELL AND TAILOR & CUTTER, LTD.

[CHANCERY DIVISION (Farwell, J.), **March 8, 1938.**]

Practice—Payment into court—Several causes of action—Payment in of lump sum—Discretion of court—Copyright—Damages for infringement and conversion—R.S.C., Ord. 22, *r.* 1 (1), (2).

A The plaintiff in respect of an alleged infringement for copyright claimed damages both for infringement and for conversion. One of the defendants sought the permission of the court to pay in a lump sum in respect of such damages without allocating it under the respective heads :—

HELD : the defendant in this case, where the damages flowed from B one wrongful act, ought to be permitted to pay in a lump sum without allocation, but stating whether liability was admitted or denied.

[**EDITORIAL NOTE.** The rule as to payment in where there are several causes of action was amended in 1933, and now requires allocation of the damages to the respective causes of action unless the court otherwise orders. A claim for damages for infringement of copyright and conversion is held to be a case in which a defendant C should be permitted to pay in without allocation, as there is likely to be a considerable overlapping of damages in respect of the two causes of action.

AS TO PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, p. 62, para. 100 ; and FOR CASES, see DIGEST, Practice, pp. 478-484, Nos. 1590-1637.]

Case referred to :

D (1) *Sutherland Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.*, [1936] Ch. 323 ; [1936] 1 All E.R. 177 ; Digest Supp. ; 105 L.J.Ch. 150 ; 154 L.T. 367.

PROCEDURE SUMMONS whereby the defendants, Tailor & Cutter, Ltd., sought the permission of the court to pay in a lump sum in respect of damages in a copyright action without allocating such payment between E the two causes of action—namely, infringement and conversion.

N. K. Lindsay for the plaintiff.

E. J. Macgillivray for the defendants, Tailor & Cutter, Ltd.

Macgillivray : I ask the court to permit me to take advantage of R.S.C., Ord. 22, r. 1 (2), and to allow me to pay into court a lump sum F without specifying for which causes of action it is paid.

Lindsay : The defendant ought not to be given this permission, as this is a case where there are different causes of action, and the defendant ought to allocate the sums paid in to each particular cause.

G FARWELL, J. : This is an action in which the plaintiff, the author of a literary work entitled SECRETS OF CUTTING : LADIES' GARMENTS, and the owner of the copyright therein, claims damages from the defendants, on the ground that they have infringed his copyright by reproducing, and by authorising the reproduction of, substantial portions H of his literary work, in a material form and without his consent, in a publication of which the second defendants are the proprietors. The defendants have in their possession a large number of copies of this publication which the plaintiff alleges were wrongfully printed by the defendants without his consent, and they still detain the same, and refuse to deliver them up to him after demand made in writing. The plaintiff also claims that the defendants have wrongfully converted to their own use a large number of copies of the issues of this publication, and he claims (i) damages for infringement of copyright, (ii) an order for delivery up to him of all copies of the issues of the said publication which are in the possession of the defendants, and damages for their detention, and (iii) damages for conversion. The defendants deny any infringement of copyright. A

After the statement of claim was delivered, the defendant took out a summons for directions asking for relief, and of the relief that was asked for the master dealt with all matters except that contained in para. 2, the one in question. In this paragraph, the defendant asks for directions under R.S.C., Ord. 22, r. 1 (1), (2). R.S.C., Ord. 22, r. 1 (1), B provides :

> In any action for a debt or damages . . . the defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action ; provided that with a defence setting up tender before action the sum of money alleged to have been tendered must be C brought into court.

R.S.C., Ord. 22, r. 1 (2), provides :

> Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of which payment is made and the sum paid in respect of each such cause of action, D unless the court or a judge otherwise order.

The plaintiff contends that in this action there are several causes of action, and that therefore the defendant should notify him in respect of which cause he has paid money into court. The defendants say that these causes all arise out of one act—namely, infringement—and that they E should therefore be allowed to pay in a lump sum.

Before R.S.C., Ord. 22, r. 1 (2), was altered in 1933, it was established that there was no power to pay in a lump sum in respect of damage suffered where there were different causes of action, but that the defendant must differentiate the sums in each case. That being the position, in F 1933 the rule was altered so as to enable the court in a proper case to order otherwise—that is to say, to direct that the defendant should be given permission to pay in a lump sum without specifying the several causes of action.

What is the cause of action here ? The matter which has given rise G to the trouble is an infringement of copyright. The plaintiff claims damages for this infringement, damages for detention, and damages for conversion. In *Sutherland Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.* (1) it was a matter of common law whether the damages for conversion and the damages for infringement were alternative pleas, H or whether they were cumulative. The view which I took, wrongly, in the court of first instance, was that they were alternative pleas. The Court of Appeal came to the conclusion that the remedies were cumulative, and that damages under both heads could be recovered. Therefore, *prima facie*, this is not a case in which the defendants ought to be allowed to do that which they wish to do. It would appear that they ought to discriminate between the different causes of action. However, there are special circumstances in such a case as this. The cause of the whole trouble is a single cause—infringement—and, when it comes to assessing the damages on the various grounds, it is quite plain that there must be a certain amount of overlapping. This case differs from most other cases where there is a claim for damages, for it seems to me to be quite different from cases in which there are several causes of action.

The alteration made in 1933 in the rule is one which ought to be adopted by this court in dealing with a case of this kind. The defendants might be embarrassed if they had to assess the amount which they ought to pay in in respect of the various causes of action. They might pay in a sum in respect of the infringement, and another sum in respect of the conversion. Then the plaintiff could take out those moneys to which in fact he might not be entitled, if he failed on the basic issue of infringement.

I hold, therefore, that this is one of the few cases to which the rule was intended to apply, for it would embarrass the defendants to have to differentiate between the various causes of action. The embarrassment in which they would find themselves would be great if they paid money into court. Therefore the defendants may pay in a single sum of money without specifying for which causes this money is paid in, but must add the words " with denial of liability."

Solicitors : *Davenport & Co.* (for the plaintiff) ; *Dawson & Co.* (for the defendants, Tailor & Cutter, Ltd.).

[*Reported by* J. L. Kirkhope, *Barrister-at-Law.*]

WYNDHAM *v.* JACKSON.

[Court of Appeal (Greer, Slesser and Clauson, L.JJ.), **March 4, 8, 1938.**]

Arbitration—Reference to court—Order for account—Master dealing with questions outside order at request of counsel on each side—Whether master's certificate may be treated as an award.

The plaintiff issued a writ in the Chancery Division claiming an account and payment of all sums due to her under a contract entered into by the plaintiff with the defendant. An order was accordingly made for an account. At the request of both parties, the master gave a decision on a matter which was not covered by the judge's order for an account, and he issued a certificate to the effect that a certain sum was due from the defendant to the plaintiff. The defendant sought to have the certificate discharged or varied by a judge of the Chancery Division, but the judge treated the certificate as a nullity, on the ground that the master had no power to consider matters not within the scope of the original order for an account. The plaintiff then sought unsuccessfully to enforce the master's certificate, asking for the payment of the sum alleged to be due to her. The plaintiff then brought an action in the King's Bench Division, claiming payment of the amount awarded by the master, on the ground that the master had acted as an arbitrator, and that his decision was therefore in the nature of an award :—

HELD : the intention of the parties was that the master should deal with the dispute according to the ordinary process of the court, under which his determination would not be final, but subject to a further order by the judge. His decision, therefore, could not be treated as an award, and the present action could not succeed.

Decision of GODDARD, J. ([1937] 3 All E.R. 677) *reversed.* A

[**EDITORIAL NOTE.** In the court below the consent of the parties had been treated as a submission of the additional matters to the arbitration of the master. This is, however, rejected because the proceedings of the Chancery master upon taking accounts is not a proceeding resulting in a final order binding upon the parties. The determination of the master in such a case has always to be brought B before the judge for a final order. The master was not, therefore, in such a case, in the position of an arbitrator, for the latter's decision is always a final one.

AS TO PROCEEDINGS UPON AN ORDER FOR ACCOUNTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 52, 53, paras. 84, 85 ; and FOR CASES, see DIGEST, Practice, pp. 516-521, Nos. 1846-1878.]

C

Cases referred to :

(1) *Pisani* v. *A.-G. for Gibraltar* (1874), L.R. 5 P.C. 516 ; Digest Supp. ; 30 L.T. 729.

(2) *Bickett* v. *Morris* (1866), L.R. 1 Sc. & Div. 47 ; 44 Digest 14, *65* ; 14 L.T. 835.

(3) *Burgess* v. *Morton*, [1896] A.C. 136 ; 2 Digest 317, *40* ; 65 L.J.Q.B. 321 ; D 73 L.T. 713.

(4) *Craig* v. *Duffus* (1849), 6 Bell Sc. App. 308.

APPEAL AND CROSS-APPEAL from a decision of GODDARD, J., dated July 8, 1937, and reported in [1937] 3 All E.R. 677. E

John Busse for the appellant.

Constantine Gallop for the respondent.

Busse : I rely on *Pisani* v. *A.-G. for Gibraltar* (1). This was not an arbitration. The parties always intended to keep all their rights, including rights of appeal. The intention of the parties is a vital matter. F [Counsel referred to *Bickett* v. *Morris* (2).] Both parties have treated this certificate as a part of the process of the court. Both parties sought leave to appeal. In *Burgess* v. *Morton* (3), a case said to be against me, both parties had agreed for the court to act as arbitrator.

Gallop : It is admitted that it was never intended to constitute Master G MOSSE an arbitrator, but the court must ignore the intentions of the parties and see what the results were. The result of what happened and of what was said in this case was that the parties did constitute the master as an arbitrator. If the parties go before a tribunal in the belief that its determination is subject to review, but in fact the determination H is not subject to review, then it is an award, and cannot be appealed. The parties made a mistake, and there is no appeal. If parties mistake their rights of appeal, they cannot treat the matter as a nullity. [Counsel referred to *Craig* v. *Duffus* (4).]

Busse was not called on in reply.

GREER, L.J.: As this case involves the discussion and consideration of the usual practice in the Chancery Division, I have asked my brother CLAUSON, L.J., to deliver judgment in the first instance.

CLAUSON, L.J.: This is an appeal from a judgment of GODDARD, J., in which he has given judgment for the plaintiff for the sum of £91 11*s.* 4*d.* On turning to the writ in the action, it appears that the claim for that sum is put in this way: for the sum of £91 11*s.* 4*d.* the amount awarded to be paid by the defendant to the plaintiff:

> by the award in writing of Robert Lee Mosse, Esq., dated May 21, 1936, or alternatively July 31, 1936 [that is dropped out] or alternatively contained in both the said documents made pursuant to an oral submission to arbitration by counsel on behalf of [the plaintiff and defendant respectively] on Mar. 25, 1936.

An action on an award is, of course, an action on a contract—on the agreement made between the parties to pay what shall be determined by the award of the arbitrator. Accordingly, the first step necessary to see whether or not the plaintiff has a good cause of action is to inquire as to what was the agreement between the plaintiff and the defendant which resulted in what is said to be an award. For that purpose, it is necessary to go back into the history of this somewhat unfortunate case. The plaintiff and the defendant were concerned in what I think I may conveniently call a dramatic speculation. As a result of certain theatrical performances in the country, the particular adventure came to an end. The result was that the plaintiff was claiming against the defendant to have an account taken of profits derived by the defendant from the tour, and a payment of all moneys due to the plaintiff under the terms of an agreement in writing dated May 13, 1935. The plaintiff issued her writ in the Chancery Division, claiming that relief. It appearing on the face of it that the whole subject-matter of the action was a question of account, as often happens, a summons was taken out to ask for the account to be taken at once, without any further proceedings, pleadings or anything of that sort, which is, of course, a very convenient procedure when the documents which contain the contract which give rise to the right to an account are not in dispute between the parties. On the footing that that was the position, an order was made which was in fact made by Master HOLLAND, sitting for Master MOSSE, who no doubt was engaged in some other business. Although it is made by the master, it has the same effect as has an order made by the judge. It is an order of court. That order is in these terms:

> Upon the application of the plaintiff by summons . . . and it appearing from the defendant's affidavit that she contends that she has sufficiently accounted for and tendered to the plaintiff all sums due to the plaintiff under or by virtue of the agreement hereinafter mentioned and the plaintiff and the defendant without prejudice to the defendant's said contentions or to the denial thereof by the plaintiff by their counsel respectively consenting to this order it is ordered that the following account be taken that is to say an account of the net profits derived from the tour referred to in the agreement dated May 13, 1935, and made between the plaintiff of the one part and the defendant of the other part the terms whereof are contained in a letter of that date addressed to the plaintiff and signed by the defendant.

The account was to go down to a particular date.

On that order the usual steps were taken. A summons to proceed was taken out, and the matter came before the master. What occurred before the master appears from what is contained in the certificate which he ultimately signed. It appeared that, when the plaintiff and defendant came before the master by counsel, they were agreed :

> that the contract sued upon in this action was not to be treated as if its terms were solely contained in the agreement of May 13, 1935, but was to include such other terms if any as might be established by the oral evidence given before me by and on behalf of the plaintiff and defendant.

I will consider for one moment what that meant. The action had proceeded, and the order for the account had been, on the footing that all the court had directed the master to see was what were the terms of the agreement under which the account had to be taken, which was the document of May 13. Counsel agreed before the master, however, that that was not right, that that was too narrow in scope, and that it really ought to have been an action to enforce an agreement part of which was contained in that letter and part of which was to be ascertained from the evidence of the parties. An account of what was due, having regard to the terms of that wider agreement, was a different thing from that which was being asked for in the account which had been ordered by the order to which I have just referred. However, the master, anxious to facilitate the matter, proceeded to investigate the question of account on the extended basis to which the plaintiff and defendant by their counsel had agreed. Having gone into the matter, he came to the conclusion that the balance of the account, after certain items had been dealt with, was this sum of £91 11*s.* 4*d.*, which figures later in the writ which started the action in which this appeal is now before this court.

The master himself gave evidence before Goddard, J., in this action, and from his evidence it appears that the matter proceeded before him in accordance with the ordinary process of taking accounts in the Chancery Division, and that he mentioned to counsel that there was also an appeal to the judge upon the question of the certificate. The matter having been concluded before the master, the master signed the certificate, which was in the usual form except that it specially recorded the arrangement which I have already stated. In fact, what I have stated as to the arrangement made between counsel I have stated by reference to the master's account of it in the certificate.

The certificate having been signed according to the ordinary process of taking accounts in the Chancery Division, either party having the right to apply to the judge to vary the certificate—in other words, to correct the account as taken by the master—the defendant was dissatisfied with the master's decision, and took out a summons to vary. That summons came before Farwell, J., who seems to have pointed out that the account which the master had taken was outside the action, and outside the order of reference to the master directing the account, in that it dealt with the rights of the parties as arising from an agreement different from the agreement which, according to the writ, was the agreement which was being enforced. Taking the view that the master had gone outside his directions, the judge said that he was not proposing to deal with the summons, but that he thought that the whole matter was irregular. He seems to have used some expressions to the effect that the certificate was a nullity. At all events, he was not prepared to treat the matter as being within the ordinary process of taking the accounts in this particular action, and he refused to listen to the summons to vary. From that decision there was no appeal.

The next step in the proceedings is this. The plaintiff, being anxious to do what she could with the account which she had obtained from Master MOSSE, resulting in a balance in her favour of £91, took out a summons asking for the payment of the £91. That summons came before LUXMOORE, J., who took what I venture to think was the only possible step. He said :

> It is impossible for me to make this order for payment of this sum. FARWELL, J., has held the proceedings to be irregular.

I do not know whether or not LUXMOORE, J., referred to it, but he might well have said : " How can I make an order for the payment of a sum found due on a certificate when somebody wishes to vary the certificate, and, owing to what has happened, has been deprived of the opportunity of getting the certificate varied ? " Whatever the reasons actuating LUXMOORE, J., he took what I venture to think was the only course he could take, and refused to make any order on that application.

It appears that at that hearing something was said as to the possibility of the £91 being treated as being paid under an award, and that seems to have inspired the plaintiff to take the next step, which was to start the action with which we are now concerned. To make the story complete, I ought to say that, while the King's Bench action was pending, the defendant took out a summons to dismiss the Chancery action for want of prosecution. The summons came before me, and I will only say that I took the view that, while the King's Bench action was pending, it was difficult to deal with that summons. I directed it to stand over, and I suppose it is still standing over.

Then the matter proceeded before GODDARD, J., and came on for trial before him. It becomes necessary, therefore, to consider exactly what was the cause of action of the plaintiff in the action before GODDARD, J. The plaintiff, as I understand it, is suing on the certificate of Master MOSSE as an award. I gather that from the statement of claim as indorsed on the writ. That means that she was saying : " The defendant and I have agreed that the differences between us and the sum due from one to the other should be determined by Master MOSSE. He has determined the figure at £91, and on that contract I am entitled to call on the defendant to repay me the £91." To that action there is, of course, no answer, if that be the true nature of the contract made between the plaintiff and the defendant. However, from the facts that I have already stated, it appears, in my humble judgment, that the facts show that that was not the contract at all. What was the contract ? The contract was that Master Mosse should deal with the dispute between the parties according to the ordinary process of taking accounts. That meant that Master Mosse should go through the items and come to a conclusion, which should not result in a binding judgment, but should be a conclusion on which either party might require the opinion of the judge. In other words, the true contract was that there should be paid by the one party to the other that which should ultimately, according to the ordinary process of the Chancery Division, be determined by that tribunal which has the last say in those matters—in other words, the judge. The judge did not see fit to take part in it ; he was not prepared to lend himself to it. It is not necessary for us to consider whether he was right or wrong. He did not go into the matter, and he did not give any determination. It is suggested that the result of that must be that the provisional determination of Master Mosse must stand and be a final determination, notwithstanding that neither party has had an opportunity of questioning it before the judge. It appears to me that to treat the decision of Master Mosse, as embodied in his certificate, as a final arrangement is to treat as a final arrangement between the parties that which they never in fact agreed should be the final determination between them. The result of that must necessarily be that the plaintiff's action fails, because the plaintiff has not succeeded in proving that the only agreement which could give her the right to that which she claims —namely, an agreement between the parties that what Master Mosse decided as a result of the account should be binding upon them, without any right to anybody to question it before the judge—was ever agreed to. In my view, accordingly, this action must fail. The decision at the trial by Goddard, J., in my view, cannot stand, and the appeal must be allowed.

Greer, L.J. : I agree, and I have very little to add. I agree entirely with the view expressed by Clauson, L.J., that there never was any agreement between the two parties, when they came before the master, that the master's decision should be final and binding between the two parties. The master's certificate was one which was not binding until it had been confirmed by the judge. It is impossible to say, in those circumstances, that any agreement between the parties which enlarged the jurisdiction of the master beyond that which he had under the directions of the judge could be final and binding between them. It seems to me that the case is analogous to the case referred to, which frequently happens in the King's Bench Division, where an application is made at the trial for the judge to order that a report be given to the court before the court comes to a final decision. Nothing that happens before the reporting arbitrator can have any effect upon the ultimate decision of the court. The decision is to be left to the

court, and not to the arbitrator. It seems to me that the position of the master is exactly analogous to the position of an arbitrator to whom the court have referred a matter, to make a report to the court in order that the court may give a final decision between the parties. I entirely agree with all the detail which has been referred to by CLAUSON, L.J.
A The result is that this appeal must be allowed with costs.

It is a melancholy thing to think that two ladies, disputing about a matter which may possibly be a little more than £91, but which in the end would be an almost negligible sum compared with the costs which have been incurred in the Chancery Division and in the King's Bench
B Division, should go on litigating until the amount in dispute bears no proportion whatever to the costs which the unsuccessful party will have ultimately to pay. However, so far as this appeal is concerned, it must be allowed with costs.

C SLESSER, L.J.: I agree, and I have nothing to add.

Appeal allowed with costs in both courts. Cross-appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Samuel Tonkin, Booth & Co.* (for the appellant); *Lazarus, Son & L. A. Hart* (for the respondent).

D [*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

JOSEPH EVA, LTD. *v.* REEVES.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon,
E L.JJ.), **March 1, 2, 18, 1938.**]

Negligence—Highway—Vehicles approaching light-controlled crossing—Speed of approach—Disobedience to traffic-lights—Highway Code—Road Traffic Act, 1930 (*c.* 43), *s.* 45 (4).

An accident occurred at a crossing controlled by traffic-lights. R., the driver of a police car, approached the crossing travelling at about
F 25 m.p.h. to 30 m.p.h. When he was some 20 or 30 yards from the crossing, the lights changed to green. At that time the half of the road which was R.'s proper side of the road was impeded by a tramcar and an omnibus and other traffic, and R. pulled out on to the other half of the road and passed the other vehicles just as they were starting to move. He then saw the appellants' van crossing at right angles to his own path, and it was found as a fact that the appellants' van had entered
G the crossing when the appropriate lights were showing red. Although R. acted with promptitude and turned his car to the right, there was a collision. Each party brought an action against the other, alleging negligence:—

HELD: R. was not in the circumstances negligent. He owed no duty to traffic entering the crossing in disobedience to the lights, beyond
H a duty that, if he in fact saw such traffic, he ought to take all reasonable steps to avoid a collision.

[**EDITORIAL NOTE.** The Court of Appeal have here considered the application of the principles of the law of negligence to crossings controlled by traffic-lights. The main proposition here laid down is that the driver entering the crossing is entitled to assume that there is no traffic entering the crossing against the lights. He can therefore overtake traffic on the offside provided that he in no way endangers traffic lawfully using the crossing, i.e., traffic coming in the opposite direction, and traffic turning to the right.

As to Negligence on the Highway, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-644, paras. 894-904; and for Cases, see DIGEST, Vol. 36, pp. 59-62, Nos. 366-389.]

Cases referred to:

(1) *Hontestroom (S.S.)* v. *Sagaporack (S.S.), Hontestroom (S.S.)* v. *Durham Castle (S.S.)*, [1927] A.C. 37; Digest Supp.; 95 L.J.P. 153; 136 L.T. 33.

(2) *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243; Digest Supp.; 104 L.J.K.B. 304; 152 L.T. 563.

Appeal from a judgment of Greaves-Lord, J., dated May 10, 1937. The facts are stated in the judgments.

Rt. Hon. Sir William Jowitt, K.C., H. D. Samuels, K.C., and *R. Armstrong-Jones* for the appellants.

J. W. Morris, K.C., and *N. R. Fox-Andrews* for the respondent.

Sir Wilfrid Greene, M.R.: On July 11, 1936, a collision took place at the point where Lambeth Road crosses St. George's Road between a van belonging to the appellants and driven by their employee and a police-car driven by the respondent Reeves. Reeves, who is a police officer, had received in his car a wireless call, as the result of which he was proceeding along St. George's Road from south to north. In the car with him was a wireless operator. The appellants' car was proceeding along Lambeth Road from west to east. Both roads have upon their surface a double line of tramrails which intersect in the middle of the crossing, and the accident took place at some point just north-east of the point of intersection. The accident took place in broad daylight, in the early afternoon. It was raining, and the roads were wet. As the result of the accident, the appellants' van was damaged, but Reeves unfortunately suffered severe injuries, including the loss of his left eye. Each party brought an action against the other. The actions were consolidated, and Greaves-Lord, J., gave judgment for Reeves for £3,000 damages and costs. From that judgment the appellants appeal.

The appellants' case before Greaves-Lord, J., and in this court was presented under two heads. First, it was alleged that the appellants' driver was not negligent, and that the accident was entirely due to the negligence of Reeves. Alternatively, it was said that, if the appellants' driver was negligent, nevertheless there was contributory negligence on the part of Reeves. The judge found against both contentions.

The crossroads in question are provided with traffic-lights and the usual steel lines marking the place where vehicles halted by the traffic-lights must stop. The appellants' case was that the traffic-light on the north side of Lambeth Road, to the west of the crossing by which their driver's progress into the crossing was controlled, was showing green at the moment when he passed it. Alternatively, it was said that, if it was not green, it had changed from green to amber at the moment when he reached the steel line, and that, in the circumstances, he was entitled to proceed across St. George's Road. It was further said on the appellants' behalf that Reeves passed the traffic-light on the west side of St. George's Road, which controlled his progress across Lambeth Road, at a time when it showed red, or, at best, red and amber. A Alternatively, it was said that, if it was showing green when he passed it, he had no right to cross Lambeth Road without taking due precautions to see that he did not come into collision with the appellants' van, which, on the hypothesis stated, was lawfully crossing St. George's Road.

The crucial matter with regard to these contentions was, of course, B the nature of the signals shown by the two sets of traffic-lights at the relevant points of time. There was a conflict of evidence in the court below on this point, but the judge accepted the evidence of witnesses who said that the traffic-light in Lambeth Road was showing red when the appellants' van passed the steel line and that the traffic-light in C St. George's Road was showing green at the time when Reeves passed it. Upon this finding of fact, the appellants' driver was clearly guilty of negligence. We were invited to say that the judge's conclusion upon this issue should be set aside, but in my judgment this court ought not, in the circumstances, to set aside the judge's finding of fact. There D was, it is true, a substantial body of evidence the other way, which the judge could have accepted if he had thought it right to do so; but he saw the witnesses, and we ought not to interfere with his finding upon our own view of the evidence and the probabilities of the case. As LORD SUMNER said in *S.S. Hontestroom* v. *S.S. Sagaporack* (1), at p. 47:

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> the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

I accordingly proceed to consider the second argument upon the basis that the facts with regard to the traffic-lights were as found by the F judge. He also found that the traffic-light in St. George's Road turned to green at a time when Reeves' car was some 20 or 30 yds. away. At that time there was at the steel line a tram, northward bound, on the near-side set of rails in St. George's Road. On its left there was an omnibus, with a car in front of it, and another car was on the left of the G omnibus. It is not in dispute that Reeves was driving at a smart pace—from 25 to 30 miles an hour—and that, in order to get in front of the traffic to which I have referred, he overtook it on the right, going well over the crown of the road on the off side in doing so. There was at the time in St. George's Road, at the steel line on the opposite side of H the crossing, one omnibus, southward bound. Reeves stated that, as he overtook the vehicles on the south side of the crossing, they had just started to move, with the result that his vision to his left, in the direction of the appellants' van, was obscured. As he passed the lights, he looked to the right and saw that no traffic was coming westwards towards the crossing from Lambeth Road. His intention was to turn to the left side of the road as soon as he had overtaken the vehicles, which, as he said, had started to move, but, before he could do so, he saw the appellants' van coming across his path, and, realising that a collision was inevitable, he turned to the right. The collision then took place.

It is to be observed that, in view of the pace at which Reeves was A
driving, the fact that the traffic which he was overtaking had only just started to move, and the fact that there was no southbound vehicle nearer the crossing than the southbound omnibus to which I have referred, Reeves' action in overtaking the vehicles on his left would have involved no danger to a vehicle coming in the opposite direction B
to himself, for he had ample time to swing across to the left-hand side of St. George's Road before the southbound omnibus reached him.

It is said that Reeves was negligent in that, notwithstanding the fact that the light showed green in his favour, it was his duty on entering the crossing to proceed at such a pace as to enable him to avoid coming C
into collision with any vehicle entering the crossing from the west along Lambeth Road, and that he owed this duty to the appellants notwithstanding the fact that the appellants' van had passed its traffic-light when it was showing red. By way of reinforcement of this argument, it is said that Reeves had no right to pass the northbound vehicles on D
the offside of the road, and that he acted in a way forbidden by certain provisions of the Highway Code.

The regulations relating to traffic-lights are to be found in the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, made by the Minister of Transport under the Road Traffic Act, 1930, s. 48. The E
significance of light-signals is stated in reg. 28. By para. 1 the red signal shall be taken as prohibiting vehicular traffic to proceed beyond the stop-line until the green signal is shown. By para. 3 the green signal shall be taken to indicate that vehicular traffic may pass the signal and proceed straight on or to the left or to the right with due regard to F
the safety of other users of the road. It is beyond question that, upon the judge's findings of fact, the appellants' driver acted in breach of para. 1. In my opinion, Reeves was entitled to assume that traffic approaching the crossing from the west would act in obedience to the statutory regulations, and he was not bound to assume, or provide for, G
the case of an eastbound vehicle entering the crossing in disobedience to the red light. This does not, of course, mean that, if he had noticed the appellants' van in time, it was not his duty to take all reasonably possible steps to avoid coming into collision with it, notwithstanding that the appellants' van was acting in breach of the regulations. In H
fact, however, he did not see it, and I do not see how it can be said that he was under any obligation to assume the possibility of its presence. It is said that before entering the crossroads he ought to have satisfied himself that there was no eastbound vehicle entering the crossroads in defiance of the traffic-light, and that by placing himself on the offside

of moving northbound traffic, which obscured his vision, he was guilty of negligence, in depriving himself of the possibility of seeing traffic entering the crossing from the west. If I am right, however, in thinking that he was under no duty towards traffic entering the crossing in disobedience to the light to assume the possibility of such entry, it cannot have been negligence on his part to put himself in a position where such traffic, if it existed, would be invisible to him.

With regard to the suggestion that Reeves ought not to have overtaken the northbound traffic on the offside of the road, it does not appear to me that his action in so doing has any relevance to the present question. As I have already pointed out, the course which he took involved no danger to the southbound traffic in the circumstances, and, if it had not been for the breach of the light-signal regulations by the appellants' driver, the manœuvre would have been carried out with perfect safety. Here again, in deciding whether or not to execute such a manœuvre, Reeves was not, in my opinion, under any duty to assume the presence on the crossing of a vehicle which had got there in defiance of a light-signal. Under r. 27 of the Highway Code, tramcars may be overtaken on either side, subject to any local provisions to the contrary. It is not suggested that there were any such local provisions.

So far, I have been considering the question without regard to the breaches of the Highway Code of which it is said that Reeves was guilty. The effect of such breaches, as bearing on the question of negligence or other liability, is stated in the Road Traffic Act, 1930, s. 45 (4), as follows :

> A failure on the part of any person to observe any provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

It is to be observed that failure to observe a provision of the code does not in itself necessarily constitute negligence, and that the effect to be given to such failure must necessarily depend upon the circumstances of the case. In some circumstances, such failure may be sufficient to establish civil liability. In other cases, the fact of failure may have little, if any, relevance to the actual cause of the accident. The Highway Code is a general code applying to the roads of the country in general. Rule 34, on which the appellants particularly rely, says : "Never overtake at crossroads." Where traffic at crossroads is not regulated by a traffic-light or the police, this regulation is an obvious canon of good driving, since overtaking at unregulated crossroads necessarily involves a risk to other traffic lawfully on the highway. It is a very different matter, however, where traffic at crossroads is regulated by traffic-lights or the police. The effect of such regulation is to give to the traffic in whose favour the lights are showing the monopoly of the crossing. When the traffic-stream is set free by the green light, the vehicles in that stream proceed in the direction in which they are going upon that basis. Faster-moving vehicles overtake vehicles on their near side which are moving at a slower pace. This is what regularly happens at every controlled crossing, and, if it is a breach of the Highway Code to do it, that code is being broken at every moment of the day. Of course, an overtaking vehicle in such circumstances must have due regard to traffic coming in the opposite direction, and to the possibility that vehicles in the stream of traffic may desire to turn to the right or to the left into the road across which the stream is proceeding, but the mere act of overtaking appears to me to be of no relevance on an issue of negligence such as is raised in the present case.

The regulations of the code and the provisions of the Road Traffic Act, 1930, s. 45 (4), must be read in connection with the legislative provisions in force in regard to traffic-lights. I cannot read those regulations as imposing upon a driver who acts in obedience to traffic-lights any special duty of care towards a person who is unlawfully driving across his path. This applies to all the regulations of the code upon which reliance was placed, and I need not deal separately with them.

The last argument to which I need refer is to the following effect. It is said that it was the duty of Reeves, even though the traffic-light was favourable to him, to enter the crossing in such a way and at such a pace as not to run down any vehicle lawfully on the crossing, that, if the appellants' van had been moving at a slower pace, it might have been lawfully on the crossing at the point of collision, because it would have passed its traffic-light in Lambeth Road, west of the crossing, earlier than it in fact passed it, at a time when that light would have been showing green or amber, and that for this reason Reeves was guilty of negligence. This argument appears to me to rest on a fallacy. It is true that, notwithstanding that the light was in his favour, Reeves owed a duty to anyone lawfully on the crossing, but negligence is the breach of a duty owed to the person who complains of it, and the fact that in different circumstances a duty would have been owed to the appellants or to some other person does not lead to the conclusion that a duty was owed to the appellants in the circumstances as they actually existed. The appeal is dismissed with costs.

Scott, L.J.: I have now had the advantage of reading the judgment of Sir Wilfrid Greene, M.R., and agree with it so completely that I can omit a good deal of what I had written, but possibly it may be helpful if I still express in my own way some part of what I had intended to say. I do so because of the extreme importance, in the cause of safety on the roads, of bringing home to drivers as definitely, and even as graphically, as possible what the law now is as to traffic at cross-roads controlled by lights without police. Nothing but implicit obedience to the absolute prohibition of the red—and indeed of the amber, subject only to the momentary discretion which it grants—can ensure safety to those who are crossing on the invitation of the green. Nothing but absolute confidence, in the mind of the driver invited by the green to proceed, that he can safely go right ahead, accelerating up to the full speed proper to a clear road in the particular locality, without having to think of the risk of traffic from left or right crossing his path, will promote the free circulation of traffic, which, next to safety, is the main purpose of all traffic-regulation. Nothing again will help more to encourage obedience to the prohibition of the lights than the knowledge that, if there is a collision on the crossroads, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage compliance with the summons of the green to go straight on than the knowledge of the driver that the law will not blame him if unfortunately he does have a collision with an unexpected trespasser from the left or right.

In the course of the hearing before us, it became plain that the stories told by the two sides at the trial had been directly contradictory, and that the conclusions of the judge had been much influenced by his views of the individual credibility of the witnesses. On the questions of fact, counsel for the appellants were unable to point either to any specific insufficiency in the positive evidence on which the judge had acted or to any crucial error in his inferences. The vital issue is, and was, the condition of the lights at the time when the respective vehicles approached and passed them. For the well-known reasons stated by Sir Wilfrid Greene, M.R., it was impossible for us to revise his decisions, even if we doubted them, because so much turned on which witnesses he believed. We accordingly intimated to counsel during the appeal that we could not interfere with the judge's findings of fact.

I confess that during the argument of the appeal I felt some doubt as to whether, as trial judge, I should have arrived at the same conclusions of fact, and I note that MacKinnon, L.J., whose judgment I have also had the privilege of reading, expresses such a doubt. I gather that Sir Wilfrid Greene, M.R., feels it also. I have read through the whole of the evidence again carefully, however, and do not now doubt the judge's two crucial conclusions of fact—namely, that the appellants' driver entered the crossroads area after the red had opened against him, and that Reeves in the police-car had had the green open to him for some 20 yds. before he entered it. Sir Wilfrid Greene, M.R., has stated all the material facts, and I need not repeat them, but I think it fair to the judge to explain why I now think he was right in his two inferences of fact. For this purpose, I must make one or two quotations from the evidence of one independent witness. There is a further possible advantage in this course—namely, that the vividness of the picture drawn by an eye-witness may help any motorists who may chance to read our judgments to visualise the scene, and so to appreciate the more clearly what we have to say on the duties of motorists in a case like the present, and the bearing of the Highway Code and lights regulations on the issues of negligence.

At the trial, the fundamental questions were whether the appellants' van crossed the stop-line against the red, whether the green was open to Reeves when he crossed his stop-line, and how far away he was when it opened. The evidence most favourable to the appellants' case was that given by the driver of the southbound omnibus in St. George's Road held up by the amber and then the red at the stop-line on the north side of the crossroad, and the evidence given by the driver of the northbound tram which was standing in St. George's Road when it was passed by Reeves in the police-car as he accelerated into the crossroads. This evidence was to the effect that the appellants' van had already crossed its stop-line before its light turned red, with a suggestion that it was near its stop-line before the green changed to amber. On its face, that evidence seems strong, but I think that it was open to the judge to reject that evidence. There was equally strong evidence directly opposed to it given by one Tasker, the driver of a westbound lorry held up by the lights in Lambeth Road and standing at its stop-line on the east side of the crossroads. His evidence was wholly accepted by the judge, and I can see no reason for doubting his conclusion. The lights facing the plaintiffs' van as it approached from the west were necessarily identical in time and colour with the lights facing Tasker. After saying that he remembered seeing the plaintiffs' van, as it approached him from the opposite direction, he gave the following answer :

> When I was driving along Lambeth Road, I noticed two things : first, road clear ; second, the lights. Knowing the green light had been green for some considerable while, I realised that it must soon very shortly be changing ; so I looked in the opposite direction to see if any vehicles were coming the opposite way, so that should he cross a rubber mat on the inside of the crossing before I should, the lights most likely would remain green ; they would not have been remaining green over a period of seconds ; but he was further away from his respective rubber mat than I was. Before I crossed my rubber mat the lights changed to amber, and before arriving at the stopping-line they changed to red. I was stationary then : nothing else to do but wait ; but, to my amazement, I saw the covered van still continuing across the crossing.

This was followed by this question and answer :

> Did he slacken speed at all, as far as you saw ?- In my opinion, not until he realised the traffic was on the move, and he saw the police-car, and the accident could not be avoided."

"The traffic" was thereupon identified as the northbound traffic in St. George's Road, which had been held up by the red lights showing south, and the witness then gave this further evidence :

> And you then saw this traffic ?—I saw two private cars definitely about their own length into the crossing which was passed by the police-car.
>
> Tell us in your own way ; do the best you can about it ?—Well, when I saw possible danger, I naturally looked to my left. I saw two small cars on the move, about their own length into the crossing, and suddenly they were passed by a police-car, which came along on the off-side tram track.
>
> Up to this time, had you ever moved, or thought of moving ?—No, sir.

After the collision, Tasker got out of his lorry and inspected the ground for skid-marks. He found them from both vehicles—from the police-car " just a faint line of about two yards on some stone cobbles," but from the appellants' van all the way back from the point of collision to a point " about his own length over his steel stopping-line." The relevance of the starting-point of the long skid-mark left by the appellants' van, as it strikes me, is that it shows when its driver first suddenly realised the imminent danger of collision with the police-car, which he could not see until it had already passed the tram and come into view in the open area of the crossroads. If the van had passed its stop-line any substantial time before its amber light changed to red, it would have got much further into the crossroads before the green showed to the police-car and the other northbound traffic in St. George's Road. It follows that, on the hypothesis of the appellants' van having got close to its stop-line before its green turned to amber, the skid-mark would necessarily mean that the police-car had crossed its stop-line, at the very latest, only just after its light had begun to show amber, when it was still showing red with the amber. This conclusion, however, is directly contradicted by Tasker's evidence that he saw the small cars on the move before the police-car passed them. The judge accepted Tasker's evidence, and, if true, it certainly justifies his finding that " the driver of Eva's van started in the crossing against the lights." By these words I think he was intending to negative the suggestion that the car had crossed the line during the amber period at a moment when it was " so close to the stop-line that it could not safely be stopped before passing the line "—that is, so as to bring it within the exception to the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, reg. 28 (iv).

As regards the police-car, the judge's finding was that the lights facing it changed from amber to green when it was still 20 yds. south of its stop-line, and this finding, too, is unimpeachable. He believed Reeves. If, then, the police-car had the green light open inviting it to proceed, and the appellants' van was a transgressor against the red, there is obviously no ground left for any appeal, unless, even in those circumstances, there is still some reason for holding that there was contributory negligence on the part of the police-car. On this, the appellants' contention before us was that Reeves was guilty of a breach of duty towards the van in that (*a*) he disregarded three of the cautionary rules of the Highway Code—namely, rr. 23, 28, 34—and (*b*) he was guilty of bad look-out. The rules in question are as follow:

> 23. Take special care at crossroads, corners and bends.
> 28. Never attempt to overtake if by so doing you are likely to inconvenience or endanger any other road-user.
> 34. Never overtake at crossroads.

Prima facie, Reeves broke all three rules. Although his view was blocked to the left—that is, towards the traffic in Lambeth Road crossing from the west—he failed to take " any special care " as required by r. 23, for he simply went straight on, as he supposed the green light permitted him to do. It is plain, also, that, in spite of r. 34, he did overtake at the crossroads, for he passed the group on his near side just as it was moving forward again after the opening to it of the green light ; and indeed he accelerated past it. He undoubtedly thereby in one sense "endangered another road user" under r. 28—namely, the appellants' van. The green light, however, was a statutory advice to him to go on, if not a command, and I cannot see how he can be blamed for doing so. Perhaps it is easiest to state the position in terms of the action by the appellants against Reeves. The defendant's omissions to comply with the three rules cannot constitute negligence towards the plaintiff unless the defendant owed the plaintiff a duty to comply, and in my view such a duty towards the plaintiff could not attach to the defendant unless in the actual circumstances of the case the plaintiff was in a position which brought him within the contemplation of the rule as an intended beneficiary of its protecting care. This, in my opinion, he could not be. The red signal had prohibited his crossing his stop-line. He had no right to be in the crossroads area at all. Indeed, he had committed a statutory offence under sect. 49 of the Act of 1930 by breaking reg. 28 made under sect. 48. The defendant had therefore no duty to have him in mind in regard to any one of the three rules, and his omission to comply with them was shown to be wholly irrelevant to the issue, as soon as the breach of reg. 28 was established against the plaintiff. In the circumstances of this case, on the finding of the judge, the defendant had no duty towards the plaintiff until the defendant had passed well into the crossroads, and then saw the law-breaking car coming across his track. It was then too late for him to do anything, and no suggestion was made that he failed in due care at that stage.

As I said at the outset, the essence of the lighting system is to prevent the presence on what the judge called "the restricted area" of the crossroads of any traffic from the red direction when traffic is ordered forward in the green-light direction. Its object is not only to prevent collisions but also to prevent unnecessary delay at crossroads, and, if a car, with the green just opened in its favour, summoning it forward, had to keep a look-out for traffic from the red direction, it would prevent that automatic resumption of forward movement by the vehicles temporarily held up which is vital to the free circulation of traffic. To hold that such a car owes a duty to a law-breaker crossing from the red direction would be to undermine the whole system of light-regulation, and to defeat an important part of its purpose. It therefore follows, in my opinion, that the Highway Code, rr. 23, 28, 34, must be read as qualified by the implied proviso that their commands or recommendations are subject to the overriding provision of the traffic-lights regulations.

The only point which remains for consideration is the argument of counsel for the appellants that there was a duty to the appellants' driver, even on the assumption that he was a trespasser against the red light, because a slow-moving vehicle might have met the defendant's car in precisely the same spot without having transgressed the lights regulations at all, since he might have crossed under the amber permissive words. I do not think, however, that a plaintiff can allege a duty to himself merely because another vehicle in different circumstances would have been owed such a duty. That argument is a fallacy. I accordingly agree that the appeal should be dismissed with costs.

MacKinnon, L.J.: I also think this appeal fails. We have had read to us from the shorthand notes all the material parts of the evidence called in the court of first instance. My own impression is that, if I had heard the case in place of the judge, I might have ordered judgment to be entered in terms other than those of the judgment now under appeal; but I am sitting in the Court of Appeal, and all that I can depend on is the written record of the evidence previously given. In these circumstances, my duty is that which has been defined by the House of Lords in various cases, most recently in *Powell* v. *Streatham Manor Nursing Home* (2). I do not think that I need read any part of that case. Applying that principle, it is clearly impossible to set aside the essential findings of Greaves-Lord, J.—namely, that the traffic-light in Lambeth Road was red when the appellants' van passed it, and that the light in St. George's Road was green when Reeves passed it. If that be so, then this collision was caused by the negligence of the appellants' van in going through the crossroads with the red light against it. Sir William Jowitt, however, strenuously argued that, on the admitted facts, we ought to hold that there was contributory negligence on the part of Reeves, and that therefore his claim for damages should be disallowed. The argument involved considerations that apply to the many places where this system of traffic-lights is in operation, and is for that reason of general importance. It was for that reason that we reserved judgment.

At crossroads thus lighted, since the red light to east and west starts at the same moment as the green light to north and south, the result, if the prohibition of the red light is obeyed, is that one road is temporarily abolished as a thoroughfare, while the other exists as an open thoroughfare. If, as the judge found, the light Reeves approached was green before he reached it, he was *prima facie* entitled to consider himself as on the open thoroughfare, and to go forward, without any apprehension that, in breach of the prohibition from its red light, the appellants' van or any other on the crossing would be intruding upon the thoroughfare that was closed to it. As Reeves was entitled to be without such apprehension, I do not think it could be said that he was doing anything negligent in going freely forward, when he was unable, by reason of the traffic which he was passing on his near side, to see into Lambeth Road upon that side.

Owing to the varying pace of vehicles of divers sorts, however, the system of traffic-lights, when a change occurs, cannot work with absolute certainty, and the appellants rely upon one aspect of this uncertainty in order to assert a charge of negligence against Reeves. It is not in dispute that the collision of these two vehicles took place at a point a little to the north-east of the centre point of these crossroads. If the judge's finding that the appellants' van passed the traffic-light when it was red be accepted, then the appellants' driver was clearly to blame. However, it is said, no doubt truly, that Reeves might have collided at this same spot with a slow-moving vehicle that had passed the western traffic-light in Lambeth Road when it was yellow, or even when it was green. Such a slow-moving vehicle, so passing, might be on a thoroughfare rightly open to it, as, on the judge's finding, Reeves' thoroughfare was open to him, but, if they were both lawfully crossing one another's tracks, both of them must be to blame for the collision, or perhaps Reeves alone. In any case, Reeves must, in such a case, be to blame, because on his own case he was going forward when he could not see the approach of this slow-moving vehicle by reason of the other vehicles on his near side. Therefore, it is said that Reeves ought, as a reasonable man, to have entertained the apprehension that there might be in existence such a slow-moving vehicle lawfully crossing his path, and he was negligent in so acting that, if there were such a slow-moving vehicle, he could not avoid it. Therefore he was negligent in this case, as well as the appellants' driver.

This is an ingenious argument, but I do not think that it is a sound one. Negligence is the failure to take reasonable care, but the duty to take reasonable care is not to be measured by any abstract standard. The duty to be established against an alleged wrongdoer is a duty to him who makes the allegation. The appellants' van was a motor car of a car's capacity of speed. It was not a hearse, or a steam-roller, or a heavy cart drawn by a weary horse. The appellants, I think, cannot with reason say: "You hit me at this spot. If I had been a steam-roller, and had passed my light when it was green, you would have hit me in the same spot, and you would have been negligent. Therefore, when you hit me in this spot, you must be equally negligent." Reeves' answer, I think, must succeed: "The question of my negligence, if any, is between you, with your car, and me. Yours is not a slow-moving vehicle, and you passed your light at red, not at green. What might be my liability to the hypothetical owner of a steam-roller that arrived at the spot where we collided is nothing to do with you, nor with my liability to you."

That the standard of care is relative to the two parties to the dispute, and not some abstract standard, is, I think, illustrated by a consideration of another aspect of the problem of negligence. It is well settled that the duty of care by the owner or occupier of premises is relative to the person who is alleging its breach. If a trespasser claims damages against the owner of premises because he has fallen into a pit, the owner can say, "I owe no duty of care to you." The trespasser might argue, with as much logic as this appellant: "But if an invitee had come along and been hurt by this pitfall you would have been held negligent. Therefore you were negligent in leaving it open. Therefore I can say you were negligent, and negligent to me." The answer is obvious: "What might be my liability towards an invitee is perfectly immaterial as between me and you a trespasser." Thus, in this case I think that Reeves can say to the appellants: "Even if, by colliding with him at this spot, I might have been held negligent as against a slow-moving vehicle that passed the light when green, that is *nihil ad rem* on the question whether I was negligent in colliding at this spot with your fast-moving vehicle that had passed the light when it was red."

Appeal dismissed with costs. Order for payment out of money paid into court.

Solicitors: *L. Bingham & Co.* (for the appellants); *Ponsford & Devenish* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

Re CONLEY (TRADING AS CAPLAN & CONLEY), *Ex parte* THE TRUSTEE *v.* BARCLAYS BANK, LTD. *Re* CONLEY (TRADING AS CAPLAN & CONLEY), *Ex parte* THE TRUSTEE *v.* LLOYDS BANK, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Clauson, L.J., and Luxmoore, J.), **February 11, 14, 15, March 17, 1938.**]

Bankruptcy—Fraudulent preference—Bank overdrafts secured by mere deposit of documents of third party without any agreement to pay sums owing—Account put into credit and documents released immediately before bankruptcy—Absence of contractual relationship between depositor and creditor—Surety or guarantor—Bankruptcy Act, 1914 (c. 59), *s.* 44.

In Apr., 1931, and again in May, 1933, the wife of the bankrupt deposited with a bank War Loan as collateral security for the bankrupt's indebtedness to the bank. In Feb., 1933, the bankrupt's mother deposited certain War Loan and Building Society shares for the same purpose. Similar arrangements were subsequently made with Lloyds Bank. Shortly before Nov. 16, 1934, by various means the bankrupt paid large sums into his accounts so that on that day the accounts were in credit. Shortly after that date, the wife and mother demanded the release of the securities and obtained them. On Nov. 30 the business of the bankrupt was closed down and he was immediately made bankrupt. The securities in question were merely deposited with the bank, and neither the wife nor the mother gave any covenant or undertaking of any kind to pay any sum to the bank:—

Held: the depositors, although they did not enter into any contract to pay the bank, were "sureties or guarantors" within the meaning of the Bankruptcy Act, 1914, s. 44, and there was, therefore, a fraudulent preference.

Decision of Farwell, J. ([1937] 4 All E.R. 438) *reversed.*

[**EDITORIAL NOTE.** The statutory enactment was altered in 1913 to extend fraudulent preference to a payment to a creditor in order to prefer a surety or guarantor. In the present case the question is whether a person can be surety or guarantor if he has not entered into any contract to pay the debt or some part thereof to the creditor. Here there was a bare deposit of securities, and the only remedy open to the creditor was to realise the securities by sale. It is here held to be immaterial, in considering whether a person is a "surety or guarantor" within the Bankruptcy Act, 1914, s. 44, whether or not that person has given any undertaking or covenant to pay the debt or any part of it.

As to Guarantors and Fraudulent Preference, see HALSBURY, Hailsham Edn., Vol. 2, pp. 368, 369, para. 498; and for Cases, see DIGEST, Vol. 5, pp. 855-857, Nos. 7174-7185.]

Cases referred to:

(1) *Re Mills, Ex p. Official Receiver* (1888), 58 L.T. 871; 5 Digest 893, *7359*.
(2) *Re Goldsmid, Ex p. Taylor* (1886), 18 Q.B.D. 295; 5 Digest 856, *7178*; 56 L.J.Q.B. 195.
(3) *Re Warren, Ex p. Trustee*, [1900] 2 Q.B. 138; 5 Digest 893, *7360*; 82 L.T. 502.
(4) *Rouquette* v. *Overmann* (1875), L.R. 10 Q.B. 525; 6 Digest 308, *2058*; 44 L.J.Q.B. 221; 33 L.T. 420.
(5) *Duncan, Fox & Co.* v. *North & South Wales Bank* (1880), 6 App. Cas. 1; 6 Digest 308, *2059*; 50 L.J.Ch. 355; 43 L.T. 706.
(6) *Re Westzinthus* (1833), 5 B. & Ad. 817; 26 Digest 125, *891*; 3 L.J.K.B. 56.
(7) *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464; 26 Digest 198, *1549*; 79 L.J.Ch. 509; 102 L.T. 300.
(8) *Bolton* v. *Salmon*, [1891] 2 Ch. 48; 26 Digest 163, *1223*; 60 L.J.Ch. 239; 64 L.T. 222.
(9) *Smith* v. *Wood*, [1929] 1 Ch. 14; Digest Supp.; 98 L.J.Ch. 59; 139 L.T. 250.
(10) *Re Lyons, Ex p. Barclays Bank, Ltd.* v. *Trustee* (1934), 152 L.T. 201; Digest Supp.
(11) *Re Stanley (G.) & Co.*, [1925] Ch. 148; Digest Supp.; 94 L.J.Ch. 187; 133 L.T. 37.

Appeal from an order of Farwell, J., dated Nov. 22, 1937, and reported in [1937] 4 All E.R. 438, where the facts are fully set out.

Roger S. Bacon and *David Renton* for the trustee.

Cyril J. Radcliffe, K.C., and *John Buckley* for Barclays Bank, Ltd.

W. N. Stable, K.C., and *J. B. Blagden* for Lloyds Bank, Ltd.

V. R. Aronson for Mrs. Bessie Cohen.

H. C. Leon for Mrs. Hannah Conley.

Sir Wilfrid Greene, M.R.: These appeals raise a novel and difficult point under the Bankruptcy Act, 1914, s. 44, and they come before us in an unusual form. The trustee in bankruptcy of one Conley claims that certain payments made by the bankrupt to the respondent banks were void, as being fraudulent preferences. The payments in question, or some of them, had the effect of putting the bankrupt's accounts with the respondent banks in credit, with the result that certain amounts of War Loan deposited by the respondents Mrs. Cohen and Mrs. Conley (in the case of Barclays Bank) and the respondent Mrs. Conley (in the case of Lloyds Bank) as security for the bankrupt's overdrafts were set free. The appellant claims that the respondents Mrs. Cohen and Mrs. Conley were sureties or guarantors for the debts due to the banks on the overdrafts, that the payments made to the banks extinguishing the overdraft were made with a view of giving to those ladies a preference over the other creditors, and that those payments are, in consequence, void as against the appellant.

When the case was opened before FARWELL, J., counsel for the appellant stated the facts which he was prepared to prove. Both sides realised that, if the facts were to be investigated, a prolonged and expensive hearing would be necessary, and counsel appearing on behalf of the various parties concurred in inviting the judge to decide the question whether or not, upon the assumption that the facts alleged were established, the appellant's contention was right in law. To this invitation the judge assented. He stated in his judgment what were the facts assumed, and held that even if those facts were established, the appellant's claim would be bad in law. From that decision these appeals are brought, and, although at one stage of the hearing we were disposed to take the view that the whole matter ought to go back to the judge in order that the facts might be ascertained, counsel for all parties requested us very earnestly to deal with the appeals on the basis adopted by the judge, informing us that a decision upon that basis would not improbably mean the end of the litigation. We agreed to take this course, and the sole question which arises, therefore, is whether the decision of the judge was correct in law, upon the facts assumed in his judgment. We cannot add to, or subtract from, those assumed facts, and it is unnecessary to restate them.

The deposit of the War Loan was accompanied in each case by a memorandum signed by the depositor. It was argued on behalf of the appellant that each depositor entered into an implied undertaking with the bank to become personally liable for the amount of the overdraft. I am unable to accept this view, and the matter must be treated upon the footing that neither of the depositors incurred any personal liability for the bankrupt's debt to the bank.

The short question, therefore, is one of the construction of the Bankruptcy Act, 1914, s. 44. If, upon the true construction of that section, the depositors were sureties or guarantors for the debts owing by the bankrupt to the bank, the facts assumed would be sufficient in law to support the claim, and the matter would have to go back for hearing. If, on the other hand, the depositors were not sureties or guarantors, as FARWELL, J., has held, the claim must fail.

The Bankruptcy Act, 1914, s. 44 (1), provides as follows:

> Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

The words "or any surety or guarantor for the debt due to such creditor" were inserted as a "minor amendment" to the Bankruptcy Act, 1883, by the Bankruptcy and Deeds of Arrangement Act, 1913. Before that amendment, the provisions of the fraudulent preference section had remained substantially the same since they first appeared in statutory form in the Bankruptcy Act, 1869. The object of the amendment would appear to have been to get rid of the effect of certain decisions under the previous Acts. In *Re Mills, Ex p. Official Receiver* (1), it was held by the Court of Appeal that a payment by an insolvent debtor to his creditor, made, not with a view to giving a preference to the A creditor, but with a view to "easing" a surety for the debt, was not a fraudulent preference of the creditor. LORD ESHER, M.R., said, at p. 872:

> It is not within the section if the debtor pays one creditor in order to benefit another. B

FRY, L.J., said, at p. 872:

> It was held in *Re Goldsmid, Ex p. Taylor* (2) that a payment, in order to amount to a fraudulent preference, must be made with a view of giving a preference to the creditor to whom it was made.

In that case, the claim to repayment was made against the creditor who C had been paid. In *Re Warren, Ex p. Trustee* (3), an attempt was made to recover from the sureties themselves, but it was held, upon the authority of *Re Mills* (1), that the claim was misconceived. In both these cases, the sureties were under a personal liability.

It was held by FARWELL, J., in the present case that the words "any D surety or guarantor for the debt due to such creditor" upon their true construction extend only to cases which, in his view, are cases of suretyship or guarantee strictly so called—namely, cases where a personal liability is undertaken—and do not include the case of a person who, without incurring personal liability, charges his property by way of E security for another's debt.

After considerable hesitation, I have come to the conclusion that the judge has placed too narrow a construction upon the words in question. It is, I think, true to say that by a contract of suretyship or guarantee, which is one of the most familiar types of commercial contract, is gener- F ally meant a contract by which personal responsibility for the debt is assumed. The earliest definition of guarantee which I have been able to discover in any legal work is contained in FELL'S TREATISE ON THE LAW OF MERCANTILE GUARANTIES AND OF PRINCIPAL AND SURETY IN GENERAL, 2nd Edn., published in 1820. A guarantee is there defined as G follows, at p. 1:

> A guarantee is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is, in the first instance, liable to such payment or performance.

It was enforceable by a special action on the case (p. 31). DE COLYAR ON GUARANTEES, 3rd Edn., p. 1, defines a guarantee as follows: H

> A guarantee is a collateral engagement to answer for the debt default or miscarriage of another person.

In ROWLATT ON PRINCIPAL AND SURETY, 2nd Edn., p. 1, the definition of a surety is:

> one who contracts with an actual or possible creditor of another to be responsible

> to him by way of security, in addition to that other, for the whole or part of the debt.

In SMITH'S MERCANTILE LAW, 13th Edn., p. 546, a guarantee is defined as :

> a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance.

In HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 16, p. 3, a guarantee is defined as :

> an accessory contract, whereby the promisor undertakes to be answerable to the promisee for the debt, default, or miscarriages of another person, whose primary liability to the promisee must exist or be contemplated.

All these definitions (with the possible exception of that quoted from ROWLATT ON PRINCIPAL AND SURETY) appear to postulate the existence of a personal liability of the surety or guarantor in respect of the matter guaranteed. No authority was cited to us which supports the proposition that the words surety or guarantor are, according to their true meaning, limited to cases where a personal liability is assumed, and the question which arises in the present case is whether or not that proposition is correct. In considering this question, it is, of course, important not to be misled by the fact that certain relationships involve the application of equitable principles similar to those which apply in the case of sureties. Their existence is recognised in the Bankruptcy Act, 1914, itself, for in sect. 28 (4) it is provided that an order of discharge " shall not release any person who was surety or in the nature of a surety " for the bankrupt. Such relationships are sometimes loosely referred to as cases of suretyship. For example, in the case of a bill accepted for value, the relationship between drawer and indorsers, on the one hand, and the acceptor, on the other, is referred to as one of suretyship by COCKBURN, C.J., and LUSH and QUAIN, JJ., in *Rouquette* v. *Overmann* (4), at pp. 536, 537. We have the authority of the House of Lords for saying that this relationship is not one of suretyship, although it is analogous thereto : *Duncan, Fox & Co.* v. *North & South Wales Bank* (5), *per* LORD SELBORNE, L.C., at pp. 11, 13, 14—quoting LORD ELDON, L.C.—and *per* LORD BLACKBURN, at p. 19.

Nothing that I say must be taken as expressing the view that analogous relationships of this kind fall within the words now under consideration. I base my decision upon the view that, upon the assumed facts of the present case, the depositors were, at the relevant date, sureties for the debt in the true sense. It appears to me that the assumption of personal liability is not a necessary element in suretyship. " Surety " and " security " are in origin the same, and a person who provides a pledge or security for the performance of another's obligation is, I think, making himself, by means of that pledge or security, a surety for that other, just as much as if he pledges his personal credit. This view accords with the language used in a number of authorities cited to us but not cited to the judge. I need refer to only two. In *Re Westzinthus* (6), Denman, C.J., in delivering the judgment of the Court of Queen's Bench, referred to the unpaid shipper of goods for which the bill of lading had been indorsed to, and deposited with, a lender by the consignee, as having " by means of his goods become a surety." In *Perry* v. *National Provincial Bank of England* (7), a person who, without entering into any covenant to pay the debt, mortgaged his property as security for the debt of others, was referred to in all the judgments of the Court of Appeal (Sir H. H. Cozens-Hardy, M.R., and Fletcher Moulton and Buckley, L.JJ.) as a surety. Reference was also made to Rowlatt on Principal and Surety, 2nd Edn., p. 8, where it is stated that :

> a person may become a surety as well by pledging, mortgaging or charging his property for the debt of another as by pledging his personal credit.

The judge was influenced by the view which he held, that the creditor who, on receiving payment, had handed back the deposited security would be left without a remedy against the depositor. I do not think it necessary to go into this question, but it must not be taken from this that I agree with the view of the judge on this point. If, and when, it arises for decision, the question whether or not the delivery of the security to the depositor was made under a fundamental mistake of fact will have to be considered. I express no opinion on this matter, but it is right to point out that, even if the view of the judge is correct, a surety who, in addition to undertaking a personal liability, charges his property as security will be entitled to keep the security as against the creditor who has been compelled to refund. The appeals must be allowed with costs, and the motions must go back to the Chancery Division for hearing.

Clauson, L.J. : At the conclusion of the arguments in the present case, I had, with some reluctance, formed the opinion that the judgment of Farwell, J., was correct, and that the court must treat itself as bound to construe the words " surety " or " guarantor " in a narrow sense, so as to exclude a person who has entered into no general personal obligation, but has merely deposited defined property as a pledge, without incurring further liability. My reluctance arose from an appreciation that there appears to be no reason in principle for applying, in regard to sect. 44 of the Act, one rule to a person who is under a general personal obligation, and another rule to a person who has placed himself under an obligation limited in its execution to a particular piece of property. I felt, however, driven to the narrower construction of the words by what seemed to me to be the *prima facie* meaning of the phrase " surety or guarantor " as shown by the textbook and dictionary definitions.

I have, however, since had the advantage of studying the judgment which is about to be delivered by Luxmoore, J. His researches satisfy me that there is no reason to believe that in its inception the idea of suretyship necessarily involved the idea of the surety making himself generally liable in person and property for the satisfaction of the obligation he undertook. His obligation in its inception seems to have been limited to the pledge deposited or indicated. In the gradual development of suretyship, the obligee, as one would expect, would call for a simpler and wider obligation on the part of the surety—namely, the obligation to satisfy the principal debt to the full by his person or property, without regard to the value of the pledge or gage—and more and more the delivery or indication of a particular piece of property as a pledge tended to become a form. If this be a correct account of the development of the law of suretyship, it is quite intelligible that the terms surety and guarantor should become associated mainly with cases where the sanction for the obligation of the surety or guarantor was not limited to the pledge, but consisted of the surety's liability to answer his obligation in person or in any property available for execution. However, it would remain that an obligation limited to the thing pledged would still be an obligation of suretyship or guarantee, though the limitation would tend to be exceptional. In comparatively modern commercial practice, the pledge (not, as a rule, of hawks or similar chattels, but more commonly of documents of title to choses in action) has again become common practice, often, for obvious reasons, divorced from any wider obligation to be answered in person or in other property available for execution. These considerations have satisfied me that it would be unsound to treat the phrase "surety or guarantor" as necessarily connoting a personal liability, and as failing to cover the very case on which the whole conception of suretyship and guarantee appears as a matter of history to be founded, of a person who has provided a pledge without undertaking liability beyond the pledge. For these reasons I am in agreement with the order as stated by SIR WILFRID GREENE, M.R.

LUXMOORE, J.: These appeals are made by the trustee in bankruptcy of one Morris Conley from two orders made by FARWELL, J., on Nov. 27, 1937. The orders were made on motions whereby the trustee sought to recover from Barclays Bank, Lloyds Bank, and the mother and wife of the bankrupt, all of whom were respondents to one or other of the motions, and are respondents to one or other of these appeals, certain moneys in respect of payments made by the bankrupt into his current accounts with the respective banks within three months of his bankruptcy.

The foundation of the trustee's claim is that these payments were made by the bankrupt for the purpose of preferring his mother and wife, and are void under the Bankruptcy Act, 1914, s. 44. The mother and wife respectively had deposited sums of War Loan with each of the banks by way of collateral security for the bankrupt's overdrafts, the deposit in each case being accompanied by a memorandum signed by the mother or wife, as the case might be, but neither the mother nor the wife entered into any express covenant to repay any part of any overdraft. The trustee alleged that the bankrupt, on the eve of his bankruptcy, and well-knowing that it was inevitable, obtained by improper means sums of cash, which he paid into his accounts at one or other of the banks, in order to put those accounts in credit, and to enable his mother and wife to recall, as they in fact did, the securities they had respectively deposited.

Farwell, J., at the request of the parties, and in order to relieve them of the expense of a hearing which would necessarily be prolonged, owing to the involved nature of the bankrupt's dealings, agreed to dispose of the motions on the basis that the facts on which the trustee relied should be assumed to have been proved, and to determine whether, on those assumptions, the respondents to the motions, or any of them, were in law liable for all or any of the sums claimed.

The judge stated in his judgment the facts which he was asked to assume, and held, on the footing that those facts had been established, that the claim of the trustee in bankruptcy failed against each of the respondents. The basis of the decision is that neither the mother nor the wife of the bankrupt was, on the true construction of the Bankruptcy Act, 1914, s. 44, a surety or guarantor of the bankrupt, because neither of them was under any personal liability to the banks, or either of them, in respect of the bankrupt's overdrafts. The trustee in bankruptcy has appealed against the decisions of the judge, and, although at one time during the hearing we were inclined to the view that it would be desirable to have the actual facts ascertained, we agreed, at the urgent request of counsel for all parties, to deal with the appeals on the basis adopted by Farwell, J., because we were told that our decision would in all probability put an end to the litigation. It is, I think, unnecessary to restate the facts set out in the judgment of Farwell, J.

The trustee in bankruptcy argued before this court (i) that the mother and wife are under personal liability to the banks in respect of the overdrafts, and (ii) assuming that the first argument failed, that a person who deposits collateral security in respect of the debt of a third party is, on the true construction of the Bankruptcy Act, 1914, s. 44, a surety or guarantor of that debt to the extent of the security deposited. The first point was not, I think, argued in the court below. It was admitted before us that, if the court should be of opinion that either of the trustee's contentions is correct, then it would be proper to remit the motions to the judge for further hearing with the material witnesses, but, if the court should be of opinion that neither contention is correct, then both appeals must fail.

So far as the first point is concerned, the respective contracts between the depositors and the banks are in each case regulated by a written document. In none of these documents is there any express provision that the depositor is to be under any personal liability, and I am unable to appreciate on what ground it can properly be said that personal liability is to be implied, and what is to be its limit. I am satisfied from an examination of the material documents that the intention of the parties in each case was to limit the depositor's liability to the amount of the security deposited, and to exclude any personal liability on the part of the depositor. In my judgment, there is no substance in the first point.

The second point, therefore, falls to be determined. It is one of considerable difficulty, although its solution involves the construction of the apparently simple phrase in the Bankruptcy Act, 1914, s. 44, " any surety or guarantor for the debt due to " a creditor. It is, I think, advisable in the first instance to ascertain what is the *prima facie* meaning of the words " surety " and " guarantor," and then to consider whether there is anything in the Act, or in the circumstances in which it was passed, to prevent the application of the *prima facie* meaning to the words in question. The word " surety " in its personal sense is defined in the Oxford Dictionary as meaning :

> a person who undertakes some specific responsibility on behalf of another who remains primarily liable ; one who makes himself liable for the default or miscarriage of another, or for the performance of some act on his part (for example, payment of a debt, appearance in court for trial, etc.)

In its impersonal sense, it is defined as :

> a formal engagement entered into, a pledge, bond, guarantee, or security given for the fulfilment of an undertaking.

The word " guarantor " is defined in the same work as " one who makes or gives a guaranty or security," while " guaranty " in its impersonal sense is there defined as :

> the action or act of securing, warranting or guaranteeing ; security ; warranty ; specifically a written undertaking made by a person called a guarantor to be answerable for the payment of a debt or the performance of an obligation by another person who is in the first instance liable to such payment or obligation.

It would seem plain that the dictionary definition of the word " guarantor " is wide enough to cover a person who, without entering into any personal obligation, gives or deposits property belonging to him as security for the performance of some act or payment by a third party, and that the definition of " surety " is at least wide enough to cover a person who promises to deposit property belonging to him to answer for the default or miscarriage of another, without entering into any other personal obligation, and if it is wide enough for this purpose, it is difficult to appreciate why it should cease to be applicable when the agreement to give the security has been performed by the transfer or deposit. If the dictionary definitions are applicable, I should have no hesitation in holding, in the present case, that the mother and wife fall within the description " surety or guarantor " for the debts due from the bankrupt to the bank. It is argued, however, that the words have in law a restricted meaning, or, alternatively, that their meaning is restricted by the Act itself, when the circumstances in which it was passed are considered. The foundation of the argument that the words have in law a restricted meaning must of necessity be the existence of such a meaning. The judge has held that in law the meaning of the words is in fact restricted to those cases in which the liability is personal.

It is said that the words "surety" and "guarantor" are in law synonymous, and that each is restricted to those persons who enter into a personal obligation, and excludes persons who, without entering into any such obligation, give property by way of security or pledge. I have A been unable to find any definite statement that the words have in law any such restricted meaning, although in some of the text books the legal definition would appear to suggest that personal liability is an ingredient in the relationship between the surety or guarantor and the creditor secured or guaranteed. In FELL'S TREATISE ON THE LAW OF B MERCANTILE GUARANTIES AND OF PRINCIPAL AND SURETY IN GENERAL, 2nd Edn., 1820, a guarantee is defined as :

> a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is in the first instance liable to such payment or performance.

C

In DE COLYAR ON GUARANTEES, 3rd Edn., p. 1, a guarantee is defined as a collateral engagement to answer for the debt, default or miscarriage of another person. In HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 16, p. 3, the definition of a guarantee is given as :

> an accessory contract, whereby the promisor undertakes to be answerable to the promisee for the debt, default, or miscarriages of another person, whose primary liability to the promisee must exist or be contemplated. D

In SMITH'S MERCANTILE LAW, 13th Edn., p. 546, a guarantee is defined as :

> a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, E liable to such payment or performance.

In ROWLATT ON PRINCIPAL AND SURETY, 2nd Edn., p. 1, a surety is defined as :

> one who contracts with an actual or possible creditor of another to be responsible to him by way of security in addition to that other for the whole or part of the F debt.

In my judgment, none of these definitions is sufficiently clear to exclude the case of a person who agrees to pledge, or in fact pledges, a specific part of his property to answer the debt, default or miscarriage of another, without entering into any agreement to incur personal liability. Such G an agreement would, I think, plainly fall within the provisions of sect. 4 of the Statute of Frauds.

It is stated in ROWLATT ON PRINCIPAL AND SURETY, 2nd Edn., p. 8, that a person may become a surety as well by pledging, mortgaging or charging his property for the debt of another as by pledging his personal H credit. In fact, he may become a surety in both ways at once. Reference is made to *Bolton* v. *Salmon* (8) and *Smith* v. *Wood* (9). I am, however, unable to find that either of these cases supports the first part of the statement, which is, in my opinion, supported by the decision in *Perry* v. *National Provincial Bank of England* (7), to which I will

refer later. Undoubtedly there are many cases in the books where
judges have referred to a person who has pledged his property with the
creditor of a third party to answer the debt, default or miscarriage of
another, without any agreement involving personal liability as a surety.
Counsel for the appellant referred to a number of these, none of which
A was cited in the court below. The strongest example of such cases is
to be found in the case of *Perry* v. *National Provincial Bank of England* (7),
to which I have just referred. One Perry executed mortgages of certain
property belonging to him to the bank to secure the overdraft of his
two sons, who carried on business in partnership. The mortgages
B contained no personal covenant by Perry for the payment of any sum to
the bank. Both Neville, J., and each of the members of the Court of
Appeal referred to Perry as a surety. Sir H. H. Cozens-Hardy, M.R.,
said, at p. 471 :

> This is a curious case arising out of the law of principal and surety. It is
> C important to distinguish clearly between the rights of a surety under an ordinary
> contract of suretyship not containing any special provisions and the rights of a
> surety where the instrument creating the suretyship contains certain special clauses.
> It is elementary law that in a simple case of principal and surety the surety is
> discharged if the creditor gives time to the principal or does certain other acts ; and,
> *a fortiori*, if the creditor releases the principal debtor, of course the surety is released
> too. There are a certain number of acts which will not release the surety if, when
> D the act in question is done, there is a reservation of rights against the surety. A
> common instance of this is giving time. When you find in the instrument of suretyship
> itself a provision that the surety shall be liable notwithstanding certain acts
> being done by the creditor which would otherwise release him, these doctrines have
> no application at all. It is not then a simple contract of suretyship. It is true that
> in one sense it is a contract of suretyship, but it is a contract of suretyship
> containing special clauses which deliberately exclude certain rights which the surety
> would otherwise have had. Before I read the instrument in question in this case
> E I may observe that it is a very peculiar document. It is a document in which there
> is no covenant to pay the debt ; it is a document in which the surety's property is
> made available to the creditor. The plaintiff conveys certain property to the
> defendant bank for the purpose of securing the account of certain customers of the
> bank, Messrs. Perry Brothers. There is no covenant to pay the debt. . .

Sir H. H. Cozens-Hardy, M.R., throughout his judgment refers to Perry
F as " the surety ", and to the mortgage as " the suretyship instrument."
Buckley, L.J., in the same case, at p. 477 refers to Perry as the surety,
and at p. 478 he says that the effect of the mortgage deed is that " the
surety mortgages his property to secure the principal debt."

It is true that in some of the cases quoted judges have used the word
G " surety " to describe a person who is not a party to any contract for
security, but is entitled in equity to rights similar to those enjoyed by
a person who is a surety in the strict sense of the word. An instance of
such user is to be found in *Rouquette* v. *Overmann* (4), where Cockburn,
C.J., and Lush and Quain, JJ., describe the acceptor of a bill of exchange
H accepted for value as surety for the drawer and indorser of the bill.
Such a relationship is not one of suretyship, although it was described
by Lord Selborne, L.C., and Lord Blackburn respectively in the
case of *Duncan, Fox & Co.* v. *North & South Wales Bank* (5), at pp. 11, 13,
14, 19, as being analogous to it.

Our attention was not directed to any case in which it has been said in terms that suretyship is confined to those cases where a personal liability on the part of the surety or guarantor to the creditor exists. Further, it is worthy of note that, in the document used by Barclays Bank in the present case, which is obviously the common form document used by the bank in cases where a person deposits security with the bank for the overdraft of a third party, without entering into any personal covenant, the depositor is repeatedly referred to as the surety, and I have little doubt that in the commercial world a person in such a position is commonly referred to as a surety or guarantor.

Some light on the position is, I think, obtained when the history of the contract of suretyship is considered. Professor Holdsworth in his History of the English Law, Vol. 2, pp. 82-84, states that suretyship is one of the earliest steps in the development of the English law of contract. It was itself derived from the primitive method of pledging faith by the production of sureties, or by the giving of something as a security. One party to legal proceedings promises the other that he will appear in court, that he will prepare his proof, that he will satisfy judgment. Originally, the surety gave himself as security, but in later days there was a formal ceremony with a wed or gage. The furnishing of the wed was not, in the earliest cases, a mere form, although it may have become so at an early date, when the wed furnished was an article of trifling value. Professor Holdsworth's views are in accordance with those expressed in Pollock and Maitland's History of English Law Before the Time of Edward I, 2nd Edn., Vol. 2, p. 185, *et seq.* In the last-named work, it is stated at p. 224 that, in the reign of King John, the Earl of Salisbury, becoming surety for the good behaviour of Peter de Maulay, declared that, if Peter offends, all the Earl's hawks shall belong to the King. This statement is supported by a reference to the charter roll of King John. At p. 191 of the edition published in 1837 under the direction of the Commissioners of the Public Records of the United Kingdom, the material part of the document executed by the Earl of Salisbury is set out in the following form:

> Novitis me manucepisse erga dominum meum regem, quod Petrus de Maulay in nullo scienter offendet dominum regem, nec erga eum delinquet sponte, et si forte eum culpa sua offendit, omnes austurcos meos pro delicto suo domino Regi dare tenear.

On the same page there are two other cases where persons became sureties for the good behaviour of others, in each of which the security given is personal property, without any personal liability. In the one case, the security is twenty palfreys with saddles and bridles, and, in the other, two palfreys.

The conclusion to which I have come is that there is no warrant for the view that the words "surety" or "guarantor" are, in their use in legal documents, confined to those persons only who undertake personal liability in respect of the debt of a third party to his creditor, and that the words in their *prima facie* legal sense include persons who pledge, mortgage or charge their property for the debt of another, as well as those who pledge their personal credit.

It was argued that the provisions of the Bankruptcy Act, 1914, s. 28 (4)—that an order of discharge "shall not release any person who at the date of the receiving order was a surety or in the nature of a surety" for the bankrupt—demonstrate that the word "surety" is used in some narrow sense in sect. 44, but in my judgment the presence of the words "in the nature of a surety" is explained as referring to those cases which are analogous to suretyship by reason of the fact that the same equitable principles and remedies are applied to them as are applied to cases of suretyship properly so-called. I am therefore unable to accept the argument that the presence of those words imports any restriction of the word "surety" to the cases where a personal obligation is undertaken.

A further argument was sought to be drawn from the fact that the words in question, which were first introduced into our bankruptcy legislation by the Bankruptcy Act, 1913, are described in that Act with a number of other amendments under the description "minor amendments," although the results which are said to be likely to flow from holding that the words have not the restricted meaning contended for by the respondents are of so far-reaching a nature as to constitute a wide departure from the practice in existence before the amendment was made. In my opinion, this argument must be rejected, because these considerations would not justify the court in holding that the words surety or guarantor are of doubtful meaning, or have two separate meanings, one of which is wider than the other, if in fact they are not doubtful, or do not possess such meanings. Further, it appears to me that the amendment was inserted without any attempt to consider on whom the liability for the consequence of the preference in favour of a surety or guarantor was to be imposed, for there is nothing in the section which in express terms imposes any liability on the surety or guarantor, who is in fact the person preferred.

For the reasons I have attempted to express, I do not think that either word has the restricted meaning sought to be put upon it. I need hardly say that I have come to this conclusion after considerable hesitation, in view of the different opinion expressed by my brother FARWELL, J.

A further point arose before FARWELL, J., and in this court with regard to the liability of the bankrupt's wife and mother, respectively, to repay any part of the moneys, if it should ultimately be found that there was in fact any undue preference. FARWELL, J., decided that neither of them could, on the wording of sect. 44, be held liable to repay anything paid to the bank, and in so deciding he followed the decision of CLAUSON, J., in *Re Lyons, Ex p. Barclays Bank, Ltd.* v. *Trustee* (10), in preference to the decision of EVE, J., in *Re Stanley* (*G.*) *& Co.* (11). I find myself in complete agreement with the decision of the judge on this point, and I do not desire to add anything to it.

I agree that these appeals should be allowed, and that both motions should be remitted to the court below for further hearing.

Appeals allowed.

Solicitors: *F. W. Perkins* (for the trustee); *Durrant Cooper & Hambling* (for Barclays Bank, Ltd.); *Linklaters & Paines* (for Lloyds Bank, Ltd.); *Lucien Fior* (for Mrs. Bessie Cohen and for Mrs. Hannah Conley).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

R. *v.* BERNHARD.

[Court of Criminal Appeal (Charles, Humphreys and du Parcq, JJ.), **March 7, 22, 1938.**]

Criminal Law—Demanding with menaces with intent to steal—" Steal "—Claim of right—Whether honest belief in right sufficient—Larceny Act, 1916 (*c.* 50), *ss.* 1 (1), 30.

The appellant had been the mistress of A. After immoral relations had ceased, she represented to him that she had lost most of her money, and asked for his help. He agreed to pay £20 per month for one year, and paid £80 down to cover the first four months. According to the appellant's evidence she believed that she was to receive the balance of £160 at the expiration of the four months, and when that time arrived she came to A., and upon his refusal to pay, threatened to expose him to his wife, and to the public by an announcement in a newspaper. The appellant was charged under the Larceny Act, 1916, s. 30, with demanding money with menaces with intent to steal the same. The question was whether the appellant in claiming the £160 acted " fraudulently and without a claim of right made in good faith " within the meaning of the Larceny Act, 1916, s. 1 (1):—

Held: (i) the agreement between the parties was not founded upon an illegal consideration though, not being under seal, it was void for want of consideration.

(ii) it was not necessary that the appellant should be right in law or in fact in her claim of right. It was sufficient for her defence that she honestly thought she had a claim.

[**EDITORIAL NOTE.** The definition of theft in the Larceny Act, 1916, s. 1 (1), which is here considered, is an enactment which is declaratory of the common law, and, therefore, the earlier authorities dealing with the question of a " claim of right " are in point, and it is not a pure question of construction of the words of the Act itself. It will be noticed that the charge against the appellant was brought under the Larceny Act, 1916, s. 30—demanding with menaces with intent to steal—which brings into question the definition of stealing given in sect. 1 (1).

As to Claim of Right, see HALSBURY, Hailsham Edn., Vol. 9, pp. 497, 498, para. 856; and for Cases, see DIGEST, Vol. 15, pp. 888-890, Nos. 9755-9768.]

Cases referred to:

(1) *R.* v. *Walton & Ogden* (1863), Le. & Ca. 288; 15 Digest 943, *10,411*; 32 L.J.M.C. 79; 7 L.T. 754.

(2) *R.* v. *Leppard* (1864), 4 F. & F. 51; 15 Digest 897, *9847.*

(3) *R.* v. *Wade* (1869), 11 Cox C.C. 549; 15 Digest 889, *9764.*

(4) *R.* v. *Clayton* (1920), 15 Cr. App. Rep. 45; 15 Digest 889, *9759.*

(5) *Nye* v. *Moseley* (1826), 6 B. & C. 133; 7 Digest 169, *67*; 4 L.J.O.S.K.B. 178; *earlier proceedings, sub nom. Knye* v. *Moore* (1825), 2 Sim. & St. 260;

sub nom. Knye v. *Moseley* (1825), 3 L.J.O.S.Ch. 136; *subsequent proceedings* (1828), 2 Sim. 161.

(6) *Re Vallance, Vallance* v. *Blagden* (1884), 26 Ch.D. 353; 7 Digest 169, *70*; 50 L.T. 474.

(7) *Hyams* v. *Stuart King*, [1908] 2 K.B. 696; 12 Digest 193, *1527*; 77 L.J.K.B. 794; 99 L.T. 424.

A (8) *R.* v. *Farnborough*, [1895] 2 Q.B. 484; 15 Digest 885, *9720*; 64 L.J.M.C. 270; 73 L.T. 351.

(9) *R.* v. *Dymond*, [1920] 2 K.B. 260; 15 Digest 947, *10,480*; 89 L.J.K.B. 876; 123 L.T. 336.

APPEAL against conviction on the ground of misdirection of the jury. B The facts and the previous proceedings are fully stated in the judgment.

J. C. Phipps for the appellant.

G. G. Raphael for the Crown.

CHARLES, J. [delivering the judgment of the court]: The appellant C was tried at the Central Criminal Court before LORD HEWART, L.C.J., on an indictment which charged her with demanding money with menaces of a person, who was referred to during the trial as "Mr. A.," with intent to steal the same, contrary to the Larceny Act, 1916, s. 30. She was convicted and sentenced to 9 months' imprisonment, and LORD D HEWART, L.C.J., recommended her for deportation. She appealed to this court against her conviction, her principal grounds of appeal being that the judge had misdirected the jury as to the meaning of the words "without a claim of right made in good faith," which are contained in the definition of stealing in the Larceny Act, 1916, s. 1, and that he had E failed to leave to the jury for their decision the question whether the appellant, when she demanded money from the prosecutor, made the demand "fraudulently and without a claim of right made in good faith."

This case presents some remarkable and very unusual features. It F appears from the evidence that the appellant and the prosecutor met for the first time during a railway journey on the Continent in May, 1937. The prosecutor was a married man. The appellant, who is a Hungarian, was formerly a married woman, but the marriage had been dissolved. After this casual meeting, an association began which lasted for some G months, and, although the prosecutor swore in answer to a question in cross-examination that the appellant was not his mistress, nobody acquainted with the undisputed facts of the case is likely to doubt that the appellant spoke the truth when she contradicted that statement. It was, however, common ground that by Aug., 1937, at the latest, any H immoral relations which there may have been between them had ceased. According to the prosecutor, the appellant had told him at some time in June that she had lost her money on the Stock Exchange, and that, unless he could help her, "she would have to go on the streets or commit suicide." A letter from him to the appellant was produced in which he said: "I will do my best to give you the year which you wish so that you may be able to regulate your life." Eventually, in or about Aug., 1937, he agreed with her, according to his evidence, to pay her £20 a month for a year. The appellant, he said, asked for a lump-sum payment, whereupon he paid her the sum of £80 to cover the four months September to December. Having returned to England, he sent her no more money, and the case against the appellant was that in January she came to this country, sought out the prosecutor, and threatened to expose him to his wife and to the public by means of an announcement in a newspaper, unless he paid her the sum of £160 forthwith. During one interview between them, the appellant's threats were overheard by a police officer, who had been within hearing as the result of an arrangement with the prosecutor. It appeared from the prosecutor's evidence that the appellant had suggested to him that they should attend before the Hungarian Consul or a lawyer in order that the agreement between them should be put in writing. The appellant gave a somewhat different version of the conversations in which she was alleged to have threatened the prosecutor. That part of her evidence which is material to this appeal may be summarised as follows. She said that the prosecutor had agreed to pay her a sum which would cover all her expenses for a year, calculated at the rate of £20 a month. At their parting, he was to give her a cheque for as much as he could then afford, which turned out to be £80. The balance of £160 was to be paid in Jan., 1938. When she came to England in January, she believed, according to her evidence, that she was entitled to £160, and she stated that she had taken the advice of a Hungarian lawyer. It is true that there is at least one answer in her evidence which appears to be inconsistent with the plain declaration which she made elsewhere that the whole amount of £160 was to be paid in January, but we have no doubt that there was material before the jury upon which they were entitled to find that the prosecutor promised to pay her, not by instalments of £20, but in two lump sums, the second payment of £160 to be made in January.

Upon this evidence, the case made by defending counsel in his address to the jury was that the prosecution had failed to prove an "intent to steal" on the part of the appellant, in that it was not shown that she acted "fraudulently and without a claim of right made in good faith." In summing up the case to the jury, Lord Hewart, L.C.J., read the material sections of the Larceny Act, and referred to the appellant's defence in these words:

> To put her case at the very highest, does it come to more than this: "As, according to the bargain, which was an immoral bargain, arising out of immorality, I was to have £20 a month for the then succeeding eight months, I thought it would be a fair and decent thing on his part to pay me £160 down in anticipation of eight months' instalments." Well, whatever else that may be, it is not a claim of right. It is not a claim of anything which the law could recognise as a right and in good faith.

A little later, the following passage occurs in the summing up:

> Now I must direct you as a matter of law that there cannot be a claim of right in good faith within the meaning of sect. 1 of the Larceny Act, so as to answer an

allegation of stealing, if the claim is one arising out of an immoral consideration, and inconsistent with the terms even of a bargain made for an immoral consideration. You do not get anywhere near a claim of right.

At the conclusion of the summing up, the jury retired. Forty minutes later they returned, and a note was handed to LORD HEWART, L.C.J., by A the foreman of the jury, the note being in these terms :

> One member of the jury, although sharing the view of the remainder that the prisoner was guilty of endeavouring to obtain money by threats, will not agree to a verdict of guilty because he holds the opinion that she honestly believed that the money claimed was due to her.

LORD HEWART, L.C.J., thereupon further directed the jury as to the B meaning of the words "a claim of right made in good faith." The substance of his further direction is contained in the following extract from the shorthand note :

> In order that that kind of excuse may arise, there must be two elements : there must first of all be a claim of right, and, secondly, a claim of right made in good C faith. Now, on the facts of this case, there cannot be a claim of right. There might be a claim of wrong. The bargain that was made was a bargain arising out of an immoral consideration, and, on any view of the matter, that bargain could not give a claim to the present payment in Jan., 1938, of something due month by month up till August. . . . You cannot have a claim of right where the circumstances are such as to exclude the possibility of a legal claim.

At the conclusion of this further direction, the foreman of the jury put a D question, and was answered, according to the transcript of the shorthand note, as follows :

> I want your Lordship's guidance so that this one juror should have his mind cleared. I understand that his belief is that, if the prisoner thought she had a claim, that would make a verdict of guilty of blackmail an incorrect verdict.—No, I am much obliged to you. That is the kind of fallacy with which I have been E endeavouring to deal. If a person thinks two and two make five, that gives rise to nothing except error. The question is not whether she thought something or other. The question is whether on the materials it was open to her to think she had a real claim of right and made in good faith. In other words, a person cannot make a right by thinking she has one.

The jury then conferred, and it appears from the shorthand note that, F while they were conferring, LORD HEWART, L.C.J., added this observation :

> I hope you understand, members of the jury, that I am directing you in point of law on these facts there could not be a claim of right in the sense which is necessary. I direct you as a matter of law.

G After this final direction, the foreman of the jury announced that the jury were agreed, and a verdict of guilty was returned.

After hearing the questions arising on the appeal fully argued, and upon consideration of the relevant authorities, we were of opinion that the direction of LORD HEWART, L.C.J., to the jury was erroneous in H point of law, and that the conviction could not be allowed to stand. We now proceed to state our reasons for this conclusion. We agree with the view which is implicit in the direction of LORD HEWART, L.C.J., to the jury that the words "with intent to steal" in sect. 30 must be construed with reference to the definition contained in sect. 1 of the Act. The test is whether, if the money had been obtained, it would have been obtained in such circumstances that it could properly be said to have been stolen: *R.* v. *Walton & Ogden* (1). It is as to the true construction of the words “fraudulently and without a claim of right made in good faith” that we differ from the opinion of Lord Hewart, L.C.J. If the matter were *res integra,* there would no doubt be much to be said for the view which found favour with Lord Hewart, L.C.J., that the words “claim of right” A cannot be read as including a claim which is unfounded in law. We are, however, bound by a long series of decisions—many before, and one at least subsequent to, the Larceny Act, 1916—to hold that this view is incorrect, and that a person has a claim of right within the meaning of the section if he is honestly asserting what he believes to be a lawful B claim, even though it may be unfounded in law or in fact. The material words in the Larceny Act, 1916, s. 1, are declaratory of the common law, and a long and unbroken chain of authority supports this proposition.

East’s Pleas of the Crown, Vol. 2, p. 659, dealing with the defence “that the goods were taken on a claim of right,” said: C

> And here it may be proper to remark, that in any case if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal.

Mr. Phipps, in his able argument on behalf of the appellant, directed our attention to the following passage in Stephen’s History of the Criminal D Law of England, Vol. 3, p. 124:

> Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the one case in which ignorance of the law affects the legal character of acts done under its influence.

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To the same effect is the statement of the law in Halsbury’s Laws of England, Hailsham Edn., Vol. 9, p. 497, “Criminal Law,” para. 856, contributed by, among others, the late Avory, J.:

> To prevent the taking from being felonious, the claim of right must be an honest one, though it may be unfounded in law or in fact.

F

Illustrations of the application of this principle, which we conceive to be firmly established in our law, are to be found in *R.* v. *Leppard* (2), *R.* v. *Wade* (3), and *R.* v. *Clayton* (4). It follows, in our judgment, that the proper answer to the question which troubled at least one of the jury would have been that, if the prisoner honestly thought that she had a G claim, she was entitled to be acquitted, even though she was wrong in so thinking.

Further, we are of opinion that neither the nature of the consideration for the alleged bargain nor the evidence given as to the terms of that bargain justified or supported the view which Lord Hewart, L.C.J., so H clearly expressed to the jury, that the appellant’s defence of a claim of right could not be maintained. In our opinion, the agreement sworn to by the prosecutor was not made for an immoral consideration, inasmuch as illicit relations between the parties had ceased, and their renewal was not contemplated, at the time when it was made. It was unenforceable only because of want of consideration. The law is succinctly and correctly stated in Leake on Contracts, 8th Edn., p. 585 :

> A promise made in consideration of the cessation of an illicit cohabitation, or in consideration of past illicit cohabitation, or by way of compensation for seduction, is void simply for want of consideration ; so that if made in the form of a bond or a covenant under seal, there is *prima facie* a valid contract.

Without attempting to cite all the relevant authorities, we may refer to *Nye* v. *Moseley* (5), *Re Vallance, Vallance* v. *Blagden* (6), and the observations of Farwell, L.J., in *Hyams* v. *Stuart King* (7), at p. 726. It is not without significance that a precedent for a " deed of covenant securing annuity to a past mistress " is to be found in Key and Elphinstone's Precedents in Conveyancing, 11th Edn., Vol. 2, p. 565.

It is, we think, plainly impossible to found any argument against the existence in the appellant's mind of an honest belief in the justice and legality of her claim upon her failure to appreciate the distinction which an English lawyer would have drawn between the legal results of a parol agreement and an agreement under seal. It is indeed by no means clear that the validity of the agreement, which was made in France, should be held to depend on the law of England, but, as no evidence was called as to the French law applicable in such a case, it is impossible (as indeed it is unnecessary) for us to inquire whether, according to French law, the appellant might have maintained an action against the prosecutor.

It remains to deal with that part of the direction to the jury of Lord Hewart, L.C.J., which was based on the view that, on the appellant's own showing, no more than £20 was due to her from the prosecutor at the end of Jan., 1938. We have carefully examined the evidence, and, as we have stated earlier in this judgment, we are of opinion that there was certainly some evidence that the prosecutor had promised to pay the balance of £160 to the appellant in that month. Lord Hewart, L.C.J., had the advantage of seeing and hearing the witnesses, and it may well be that he was right in the opinion which he undoubtedly formed that this evidence ought not to be accepted. Nevertheless, however strong, and however well-justified, may be a judge's view that there is a preponderance of evidence against the defence of a claim of right, the question whether that defence is negatived by the evidence must be left as a question of fact to the jury. If authority be needed for this proposition, it is to be found in *R.* v. *Farnborough* (8). The judgment of Lord Russell of Killowen, L.C.J., in that case makes it plain that, even where the evidence on a charge of larceny is uncontradicted, and appears to the presiding judge to be conclusive, the question whether the *animus furandi* has been proved should be left to the jury as one of fact. In the present case, we are satisfied that there was sufficient evidence to justify a jury in finding that the appellant entertained an honest belief in her claim against the prosecutor.

Counsel for the Crown suggested that some support for the view adopted in the summing up might be found in the decision of this court in *R.* v. *Dymond* (9). As to that, it is enough to say that the court was then dealing with different words in a different section, and that the judgment delivered by Lord Reading, L.C.J., made it clear that the question then before the court was determined solely by reference to the precise words of sect. 29 of the Larceny Act. The appeal is therefore allowed, and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Arram, Fairfield & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

Re BRIGHTON (EVERTON PLACE AREA) HOUSING ORDER, 1937, E. ROBINS & SON, LTD.'S APPLICATION.

[King's Bench Division (du Parcq, J.), **March 9, 1938.**]

Public Health—Clearance area—Compulsory purchase order—Whether local authority must show reason for proceeding by compulsory purchase rather than by demolition—Housing Act, 1936 (*c.* 51), *ss.* 25 (3), 27, 29 (1), *Sched.* I.

The applicants were the owners of a site, which admittedly could properly be declared to be a clearance area. They had for some time been in communication with the local authority upon the question of the demolition of the property and the redevelopment of the site. The local authority without further notice to the applicants declared the area to be a clearance area, and on the same day made a compulsory purchase order in respect of the property:—

Held: the Housing Act, 1936, imposes no obligation upon a local authority to give reasons why it prefers to make a compulsory purchase order rather than a demolition order, and there had been no failure on the part of the local authority to do all that the Act required it to do.

[EDITORIAL NOTE. The contention in this case is that, in making these orders, the local authority is acting in a judicial capacity and must exercise any discretionary powers upon judicial principles. The local authority, on the other hand, contended that under the Act it had full power at its option to make either a compulsory purchase order or a demolition order. It preferred a compulsory purchase order as that form of order gave it power to impose restrictions upon the redevelopment of the property and enabled it to exercise to a greater extent its powers under the Act.

As to Compulsory Purchase Orders, see HALSBURY, Hailsham Edn., Vol. 26, pp. 540, 541, paras. 1144, 1145; and for Cases, see DIGEST, Supp., Public Health, Nos. 502g-502v.]

Cases referred to:

(1) *Errington* v. *Minister of Health,* [1935] 1 K.B. 249; Digest Supp.; 104 L.J.K.B. 49; 152 L.T. 154.

(2) *Sydney Municipal Council* v. *Campbell,* [1925] A.C. 338; Digest Supp.; 94 L.J.P.C. 65; 133 L.T. 63.

(3) *Re Greenwich (Prince of Orange Lane) Housing Order,* 1936, *Willey's Application,* [1937] 3 All E.R. 305; Digest Supp.; 157 L.T. 67.

Application by E. Robins & Son, Ltd., that the order confirming the Brighton Corporation (Everton Place Area) Housing Order, 1937, be quashed. The main contention of the applicants was that the corporation had acted arbitrarily and contrary to the requirements of the Housing Act, 1936, in making a compulsory purchase order rather than a demolition order.

The applicants are the owners of both property included in a clearance area and property adjoining that area. These properties were purchased by the applicants in June, 1926 with a view to pulling down the premises standing thereon and erecting thereon an extension to their neighbouring business premises. The proposed demolition did not take place, as the applicants were unable to find alternative accommodation for the tenants. In Sept. 1936, an interview took place between the applicants and the council's chief sanitary inspector at which the latter suggested that the council would be able to find alternative accommodation for the tenants. A meeting of directors was to be called to consider this proposition, but in the meantime the matter came before the housing committee of the council, who decided that the proper course was to purchase the property compulsorily, and not to make a clearance order. The council had no plan for redeveloping the site themselves, but it has been the practice of the council to make compulsory purchase orders in recent cases, because they are thus able both to own and control more property and to impose more stringent conditions with regard to its redevelopment. They accordingly, without waiting for any further communication from the applicants, declared the area to be a clearance area on Feb. 25, 1937, and made a compulsory purchase order on the same date, acting under the Housing Act, 1936, s. 25 (3) (*b*). The applicants lodged an objection, and complained that, at the interview before the order was made, the sanitary inspector suggested that the corporation could find alternative accommodation if a demolition order were served upon the company, and the latter were prepared to comply with such order. They also complained of the fact that the compulsory purchase order had been made without waiting for a further communication from the company. An inquiry followed, and the Minister confirmed the council's order. From the evidence, it appeared that the properties were unfit for human habitation, but that it was not essential for the purpose of clearing the area that a compulsory purchase order should be made, though it was the corporation's policy to make such orders as a general rule. The corporation would be willing to consider leasing or selling the property to the applicants after the corporation had acquired it, when they would be able to impose restrictions with regard to its development. It was contended on behalf of the applicants that the council were exercising a judicial discretion when deciding whether to make a clearance order or a compulsory purchase order, and that the onus was on the corporation to satisfy the Minister that they had adopted the appropriate machinery when making a compulsory purchase order. It was contended on behalf of the council that, once a clearance area had been declared, the council could make either a compulsory purchase order or a clearance order at their unfettered discretion, and that the Housing Act, 1936, s. 30, indicated that it was unnecessary for the council to state the purpose for which they were acquiring the land. The inspector recommended the confirmation of the order, being satisfied that the applicants' proposed development scheme was unsuitable, that the clearance area was properly declared, that demolition was the most satisfactory way of dealing with the area, and that the land said to be required for satisfactory development of the area was in fact so required.

A. M. Trustram Eve, K.C., and *Geoffrey Lawrence* for the applicants.

Valentine Holmes for the respondent.

du Parcq, J. : This is an appeal by Messrs. E. Robins & Son, Ltd., brought under the Housing Act, 1936. The powers of this court are stated in the second schedule of that Act. The appellants say that they are aggrieved by an order—namely, the Brighton Corporation (Everton Place) Compulsory Purchase Order, 1937, which was confirmed by the Minister of Health on July 22, 1937. In order to succeed, it is for them to satisfy me that the order is not within the powers of the Act of 1936, or that the interests of the appellants have been substantially prejudiced by reason of the fact that some requirements of that Act have not been complied with, and I am being asked to say that the order should be quashed.

What the order did was, under the powers granted by the Act, to authorise the compulsory purchase of certain lands shown pink and grey on a plan before me. Those powers are derived from certain sections which have been read by Mr. Trustram Eve in the course of his argument. I propose to refer to them only briefly. Sect. 25 gives power to the local authority to declare an area to be a clearance area, and by subsect. (3) the powers of the local authority are defined in these words :

> So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say (*a*) by ordering the demolition of the buildings in the area ; or (*b*) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon.

Then sect. 27 is in these terms :

> Where as respects any area declared by them to be a clearance area a local authority determine to purchase any land comprised in the area, they may purchase also any land which is surrounded by the clearance area and the acquisition of which is reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions, and any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or user of the cleared area.

By sect. 29 (1) it is provided :

> Where a local authority have determined to purchase under this part of this Act land comprised in, or surrounded by or adjoining, a clearance area, they may purchase that land by agreement, or they may be authorised to purchase that land compulsorily by a compulsory purchase order made and submitted to the Minister

and confirmed by him in accordance with the provisions of the first schedule to this Act.

In the language commonly used in these cases, the land, which is acquired on the ground, not that it is in the clearance area, but that its acquisition is reasonably necessary for the purposes described in sect. 27, is commonly A called grey land, as opposed to the land in the clearance area, which is called pink land, because those are the colours usually adopted in the preparation of plans.

In this case, the appellants are the owners both of pink and of grey land. The local authority declared an area, including the pink land, to B be a clearance area, and decided to employ the method of compulsory purchase. The Minister of Health has confirmed the order which they made to give effect to their intention. That is attacked, on grounds which I shall endeavour to state accurately. First of all, it is said that, although it is true that sect. 25 (3) does not in terms say so, it must be assumed C that a local authority is not entitled arbitrarily to select one or the other of the two ways of dealing with the problems mentioned in that subsection, and that they must not decide to purchase, or at any rate must not decide or be permitted compulsorily to purchase, under sect. 29, unless they show some ground for the view that that method is better D than the other method. It is said that here the local authority either had no reason for thinking the method they proposed better than the other method, or, if so, had never stated what that reason was, and that the Minister of Health ought not to have confirmed the compulsory order, that being the state of the evidence before him. Then it is said that E apparently the Minister has given some attention to that aspect of the case, because it appears from the affidavit, which is before me, sworn by a director and principal assistant secretary of the housing and town planning division of the Ministry of Health, that the Minister formed the view that a proposed development scheme put in by the applicants F at the inquiry, the appellants here, was unsuitable, and would tend to spoil the amenities of the Western Street frontage of the property. That finding appears to be relevant to the consideration of the question as to whether it would have been better to leave the property in the hands of the appellants and let them demolish it and proceed to carry out G their proposed development scheme. It is said that, when the public inquiry was held, which it was proper should be held in pursuance of the terms of this Act, nobody suggested that this plan was not a good plan, or that the proposed development scheme would tend to spoil any amenities, and that that must have occurred to the Minister of Health, H or those who properly advised him, not as witnesses, but as persons to whom authority is delegated, and that, when that point did occur to the Minister, he ought to have given an opportunity to the objectors, the appellants here, to deal with the difficulties which arose in his mind about it. It is said that he has done what, according to the case of *Errington* v. *Minister of Health* (1), he ought not to do. Mr. Trustram Eve relies on certain words of Greer, L.J., and suggests that the judge meant that, if a point occurs to the Minister which may not have been sufficiently canvassed at the public inquiry, he ought to have the inquiry reopened so that his possible objection may be answered.

The first part of the argument, Mr. Trustram Eve says, is supported by the decision of the Privy Council in the case of *Sydney Municipal Council* v. *Campbell* (2), where, considering an Act of Parliament of New South Wales, their Lordships decided that the lower court was right in thinking that the appellants were exercising certain powers of compulsory purchase for a purpose differing from those specified by the statute. With regard to that last decision, I say at once that I think that it has no relation to the facts of this case. It seems clear enough here that the purpose for which the local authority were desiring to purchase this property compulsorily was the purpose for which they were entitled so to acquire it under the Housing Act—that is to say, the purpose of demolition. I desire to state my conclusion on the whole matter quite shortly, and I think that I shall be saying nothing that is inconsistent with any of the decisions that have been cited to me, certainly nothing inconsistent with the decision of the late Swift, J., in *Re Greenwich* (*Prince of Orange Lane*) *Housing Order, 1936* (3). In so far as anything said by Swift, J., was merely an *obiter dictum*, of course I am not bound by it. I do not stop to consider whether I am bound to follow the decisions of Swift, J., in applications under this Act. That question may perhaps be somewhat academic, because it would certainly need the very strongest reasons to induce me to do anything but follow those decisions. I think that it would only unsettle the law if one judge hearing applications of this kind were to express different views—I am not referring now merely to *obiter dicta*—from those of the judge who previously heard applications under this Act, and I should be very reluctant indeed, though I am not saying that it may not be open to me to decline to follow one of those decisions, not to follow such a decision.

It appears to me that in this case nothing has been done which entitles me to say that the order made is not within the powers of the Act, or that any requirement of the Act has not been complied with, or that the interests of the applicants have been substantially, or, indeed, at all, prejudiced by reason of the fact that any requirement of the Act has not been complied with. I think that in a sense it is quite true to say that there is no obligation upon the local authority to give reasons why they prefer to take the course of compulsory purchase rather than that of ordering demolition. At the same time, I am not saying that the Minister of Health would not be entitled to say, before he confirmed an order for compulsory purchase, that he wanted to be satisfied that it would not be a better course to take to other demolition rather than to purchase the land comprised in the area. I should suppose that the Minister would start with the view that the best judges of the better course to adopt were the local authority themselves. The Act of Parliament appears to leave it to them to make the choice, though that choice must necessarily be subject, in the last resort, to the views of the Minister. In this case, they made their choice. When the inquiry was held, the counsel who appeared for the objectors was very properly given every latitude. He was allowed to deal with matters which, it was submitted on behalf of the local authority, were not relevant, but which he submitted were relevant, and which, as I follow what was said by the inspector, the inspector thought might be relevant. I should imagine that, starting with the view that he ought not lightly to refuse to sanction the method of purchase, the Minister of Health would naturally consider whether it appeared that that method was shown to be an unreasonable one, or an unsatisfactory one, by some of the evidence adduced by the objectors, and it is here that he did direct his attention, as I have said, to the plan showing the proposed development. That plan was before the inspector. It was open to all those appearing before him to make their comments upon it. I have not read through the whole of the transcript, but of course I accept it from Mr. Trustram Eve that there was really no criticism, or no serious criticism, of it. When the Minister, or those to whom he delegated his powers, came to consider the matter, it was quite open to him to say, starting with the view that the local authority ought to be the persons to decide what course should be taken : I see nothing in this plan to make me think that they ought to adopt the other course. Looking at this plan, and knowing what I know as a result of the view which the inspector perfectly properly had, of the locus, I think that this plan is unsatisfactory. I am not prepared to hold that, in taking that course, if, as it appears to me was the case, that is the course the Minister took, he was doing anything outside his powers, or anything which conflicts with what was said to be his duty in *Errington's* case (1). This was not a case of hearing evidence behind the backs of the objectors, or one of looking at any documentary evidence on which they had not had ample opportunity of commenting. If a judge sees a plan, and has to consider the question of whether or not the result of erecting a building in pursuance of that plan is going to be desirable, it may be that he will hear no criticism of the plan at the bar, and that he will hear much commendation of the plan at the bar, but if, when he comes to consider his judgment, having heard, on the one hand, commendation, and, on the other hand, nothing by way of criticism, he thinks that the plan is wholly satisfactory, and that it is undesirable that the building should be erected, it is new to me that he is under any obligation to call the parties before him again to tell them what is in his mind, and to reopen the discussion. I am very far from thinking that Greer, L.J., or any other member of the Court of Appeal, meant to say that either a judge or anyone acting quasi-judicially was under such an obligation. I see no reason whatever here for thinking that the rules laid down, not for the first time, in *Errington's* case (1) have been in any way transgressed. I think that this order was properly made, and, as far as I can see, there has been no failure to do all that should have been done in accordance with the first schedule of the Act. There has not been any failure to comply with any requirement of the Act, and the application fails.

Application dismissed with costs.

Solicitors: *R. C. Bartlett & Co.*, agents for *F. W. A. Cushman & Son*, Brighton (for the applicants); *The Solicitor, Ministry of Health* (for the respondent).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Dictum of Lord Maugham, L.C., at p. 155, *applied.* Chandris v. Isbrandtsen Moller Co. Inc. [1950] 2 All E.R. 618.

NAAMLOOZE VENNOOTSCHAP HANDELS-EN-TRANSPORT MAATSCHAPPIJ "VULCAAN" *v.* A/S J. LUDWIG MOWINCKELS REDERI.

[House of Lords (Lord Maugham, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Macmillan), **February 22, 24, 25, March 17, 1938.]**

Arbitration—Application of Statutes of Limitation to arbitrations under Arbitration Act, 1889*—Date of commencement of arbitration proceedings where no arbitrator named by either party.*

In the absence of any agreement to the contrary, it is an implied term of an agreement of reference to arbitration (in a case prior to the operation of the Arbitration Act, 1934) that the arbitrator should decide the dispute according to the existing law of contract, and give effect to defences under the Statutes of Limitation.

Where no arbitrator has been named by either party within an agreed period from the date of the notice by one of the parties, the proceedings by arbitration shall be held to have commenced on the date when the agreement to refer the dispute to a single named arbitrator was entered into.

[**EDITORIAL NOTE.** This decision, in so far as it refers to the applicability of the Statutes of Limitation to arbitrations, will not apply to arbitrations under the Arbitration Act, 1934. By sect. 16 of the latter Act, the Statutes of Limitation are to apply to arbitrations as they apply to proceedings in court; but this section does not apply to statutory arbitrations.

As to Implied Terms in Arbitrations, see HALSBURY, Hailsham Edn., Vol. 1, p. 653, para. 1104; and for Cases, see DIGEST, Vol. 2, p. 349, No. 254, and Supp.]

Cases referred to:

(1) *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607; 32 Digest 509, *1687*.

(2) *Knox* v. *Gye* (1872), L.R. 5 H.L. 656; 32 Digest 511, *1702*; 42 L.J.Ch. 234.

(3) *Board of Trade* v. *Cayzer, Irvine & Co.*, [1927] A.C. 610; Digest Supp.; 96 L.J.K.B. 872; 137 L.T. 419; *affg.* S.C., [1927] 1 K.B. 269.

(4) *Ram Dutt Ramkissendass* v. *Sassoon* (*E. D.*) *& Co.* (1929), 56 L.R. Ind. App. 128; Digest Supp.; 98 L.J.P.C. 58; 140 L.T. 542.

Appeal by the claimants in the arbitration from an order of the Court of Appeal, dated Feb. 10, 1937, affirming an order of Branson, J., dated Mar. 31, 1936, upholding an award dated Nov. 15, 1935, made in the form of a special case of Mr. A. T. Miller, K.C., the sole arbitrator, in favour of the respondents. The facts and the arguments are set out in the opinion of LORD MAUGHAM, L.C.

H. U. Willink, K.C., and *C. T. Miller* for the appellants.

Sir Robert Aske, K.C., and *J. V. Naisby* for the respondents.

A LORD MAUGHAM, L.C. [read by LORD THANKERTON]: My Lords, the appeal in this case raises two questions submitted for the opinion of the court by an award and special case made by an able and distinguished legal arbitrator. The appellants have been uniformly unsuccessful heretofore, the arbitrator, the trial judge and the Court of Appeal having B decided against their contentions, but the points raised are neither without interest nor unworthy of careful discussion. After a full consideration, your Lordships have found yourselves unable to differ in any material respect from the judgments under appeal. I will endeavour to state shortly the grounds on which I have myself arrived at that conclusion. C

The facts as stated in the special case are of some complexity, but for the purposes of this appeal they may be shortly stated. The appellants are a Dutch company carrying on business in Rotterdam, and they made their claims as time charterers under several charterparties of two steam- D ships against the respondents, Norwegian shipowners carrying on business in Bergen. Their claims, which were founded on various causes of action, were all based on the facts that they had for a long period in fact or in account paid to the respondents hire for the two vessels, the amounts being based on the alleged deadweight carrying-capacity of the E vessels, and that there had been by them an overpayment by reason of the shortage in that capacity. The arbitrator found in favour of the appellants that each vessel was short of the capacity indicated in her deadweight scale. The arbitrator has also found that the appellants have made, and that the respondents have received, overpayments of F charter-hire for a period of nearly 19 years under a mutual mistake of fact.

Timecharters were made in 1911, 1914, 1915, 1920 and 1921 between the appellants and respondents, including in the latter term their predecessor in title J. Ludwig Mowinckel. The first charter contained an G arbitration clause which the subsequent charters either incorporated by reference or repeated. It was in the following terms:

> That any dispute arising from the conditions execution or sense of this charter shall be referred to the arbitration of two persons in London, one to be nominated by the owner and the other by the charterers. Should either of the parties not name an arbitrator within 21 days from the date of notice of one of the parties, the other arbitrator named by owners or charterers shall be competent to arbitrate H alone, this charter being submitted to arbitrary jurisdiction. In case of disagreement between the arbitrators, and in case they shall not agree as to the nomination of an umpire within four weeks from the day their intention of doing so has been notified to the parties, the directors of the Baltic Mercantile and Shipping Exchange, London, shall be requested to nominate an umpire. The award of the said arbitrators or umpire shall be final and binding upon both parties hereto. The question as to which party shall bear the cost of arbitration shall be left to the decision of the arbitrators.

The ships began to run under the first time charter in Dec., 1912, and in Feb., 1913. Excluding a period during the War during which a different arrangement was made, the last time charter came to an end by the redelivery, as to one vessel, on June 11, 1931, and, as to the other, five days later. On Nov. 13, 1931, a claim was made by the appellants, based on the statement that the vessels were not of the deadweight capacity on which freight had been calculated. Correspondence followed. The respondents declined to allow the accounts, which, as they contended, had been settled, to be reopened. On Feb. 5, 1932, the respondents wrote that, if the appellants insisted on their claim, the respondents assumed that they would give the name of their arbitrator in London. On May 3, 1932, after some further correspondence, the appellants, without naming their arbitrator, requested the respondents to nominate their arbitrator in London. On May 13, the respondents stated that it was more in accordance with custom and practice that the appellants as claimants should first nominate their arbitrator. On June 28, 1932, the appellants stated in reply that they hoped to name their arbitrator in the near future. On July 9, 1932, however, they suggested that it would be a considerable saving of expense if both parties were to agree upon a sole arbitrator. The respondents agreed, and on Oct. 20, 1932, a short agreement was executed whereby, after reciting that disputes had arisen, and that the parties had agreed to vary the submissions contained in the charterparties, it was agreed that the disputes should be referred to the decision of Mr. A. T. Miller, K.C., that pleadings should be delivered on fixed dates, that lists of documents should be exchanged, that the arbitrator should be at liberty to act upon all such documentary and other evidence as he should think fit, and that, except as varied by the agreement, the original submissions should remain in force.

The respondents, in addition to other defences, set up the Statute of Limitations—namely, the Limitation Act, 1623—in answer to the appellants' claims. The arbitrator by his award and special case found that certain claims of the appellants had been established, but he held that the Limitation Act, 1623, would apply to the proceedings, and that its effect would be to bar claims arising more than six years before the commencement of the arbitration. Further, he held that the relevant date of that commencement was Oct. 20, 1932. Both these opinions were to be subject to the opinion of the court. On the footing that they were both correct, he awarded that all the appellants' claims failed. There were alternative awards in the event of the court not agreeing with his decisions on the two points. There was another contention raised by the appellants, and submitted by the special case, which need not be dealt with here, since it has now been abandoned.

It may be well to clear out of the way two matters which did not arise on the appeal. The appellants did not raise in the arbitration a possible point as to the absence of the respondents beyond the seas: stat. (1705) 4 & 5 Ann., c. 3, Amendment of the Law, s. 19, and see

Civil Procedure Act, 1833, and Mercantile Law Amendment Act, 1856. Apart from a legal difficulty, it seems not unlikely that on the facts the point was not open. The other matter to be mentioned is that the Arbitration Act, 1934, did not come into force till Jan. 1, 1935, and that its provisions do not affect any arbitration commenced before that date. A The useful provisions of sect. 16 of that Act could not therefore be invoked in this case. I need not further refer to that Act, and the following observations must be taken as referring to the law as it existed before Jan. 1, 1935.

The appellants raised two points before your Lordships which may be B stated thus. First, was it open to the respondents to rely on the Limitation Act, 1623, in this arbitration as a defence to the appellants' claims ? Secondly, if so, what incident is to be taken as being in this case analogous to the commencement of the action ? In considering the first point, it should be remembered that the Limitation Act, 1623, s. 3, C only takes away the remedy by action or set-off, and leaves the right otherwise unaffected. This seems to be a good reason for holding that there may well be cases where the object of both parties to the arbitration might be to determine whether a sum was due, though possibly or certainly not recoverable by legal proceedings. We are, however, here D concerned, as was pointed out in the Court of Appeal, with an arbitration in which legal rights are being advanced or denied. In effect, an alleged debt is being claimed. Moreover, it is not immaterial to point out that the various submissions prior to the agreement of Oct. 20, 1932, were framed as being intended to apply to future disputes. If the defence E of the statute is to be deemed inadmissible, it would seem that the claims of one party or the other might be put forward long after the persons who could give useful evidence had died and the most relevant documents had been destroyed. Further, the agreement of Oct. 20, 1932, referred the dispute to a legal arbitrator, and provided for points F of claim and defence and other matters of procedure in much the same way as if the matter were being considered in the commercial court. If any legal defences were to be excluded, it was in this agreement that one would expect to find such a provision. It is not, I think, disputed that in the present case English rules of evidence must be applicable, and G English procedure, so far as it would be applicable in an arbitration.

The matter does not rest there, because we have to consider how far the suggested elimination of defences available at law or in equity must logically be held to extend in other arbitrations. If the party defending may not rely on the Statute of Limitations, can he rely on the Statute H of Frauds, or the Act partially replacing it ? Could he rely in a commercial arbitration on the Gaming Act ? A number of like questions might be asked. It is true, and this is the main point on which the appellants rely, that the Limitation Act, 1623, s. 3, was in terms limited to actions. It may be noted that no such statute passed before the Real Property Limitation Act, 1833, expressly bound courts of equity.

There is, however, no doubt that long before the Judicature Act, 1873, where a court of equity had to adjudicate on the validity of a debt in a suit to administer an estate, or in any like suit, it held itself bound to apply the Statutes of Limitations in precisely the same way as if there were an action at law to recover the debt. There have been different reasons given for this practice (see *Hovenden* v. *Annesley* (*Lord*) (1), at A p. 631, *Knox* v. *Gye* (2), at pp. 674, 684, and see the cases referred to in HANBURY'S MODERN EQUITY, p. 76 n.), but as to the fact there is, in my opinion, no doubt. It is indisputable that, in a modern arbitration, the principles of equity must be applied just as they would now be applied in a court of law, since upon a special case for the opinion of the B court under sect. 7 of the Arbitration Act or the Judicature Act, 1925, s. 94 (replacing sect. 19 of the Arbitration Act), the court is, and has long been, bound to apply equitable rules and relief. It is difficult to see how the equitable view of the applicability of the Limitation Act, 1623, to a case of debt can be excluded in a legal arbitration. C

In this case, the appellants being a Dutch company and the respondents Norwegian shipowners, there was a good reason, if not a necessity, for selecting the law which should apply to any future disputes, and the submissions of such matters to the arbitration of two persons in London and of an umpire who in case of difference was to be nominated by the D directors of the Baltic Mercantile and Shipping Exchange showed clearly that English law and procedure were to be applied. There does not appear to me to be anything in this circumstance which leads to the conclusion that a defence which would be open in an English court was not to be available in the arbitration. E

The authorities on the question as to whether Statutes of Limitation are available in an arbitration have been carefully considered by my noble and learned friend LORD WRIGHT, presiding in the Court of Appeal, and it is not necessary to repeat them. The hesitation or the doubts expressed by SCRUTTON, L.J., in *Board of Trade* v. *Cayzer, Irvine & Co.* (3), F appear to be mainly directed against the laying down of an absolute and general rule applicable in all kinds of arbitration. At least, that is how I understand them, and, if I may say so with all respect, to that extent I agree with them. The remarks of VISCOUNT CAVE, L.C., in the same case, when the matter came before this House, certainly tend G to show that, in his view, in commercial arbitrations an arbitrator is bound to give effect to all legal defences, including a defence under any Statute of Limitation. On a careful consideration of all the cases, I am content to say that I agree with what was said by LORD SALVESEN, delivering the judgment of the Board in *Ram Dutt Ramkissendass* v. H *E. D. Sassoon & Co.* (4). In that case the Indian Limitation Act, 1908 (the relevant period being three years), was taken for practical purposes to be the same as the Limitation Act, 1623, and LORD SALVESEN observed, at p. 62:

> Although the Limitation Act does not in terms apply to arbitrations, they [their

Lordships of the Judicial Committee] think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a court of law can be equally proponed for the arbitrator's decision unless the parties have agreed—which is not suggested here —to exclude that defence. Were it otherwise, a claim for breach of a contract containing a reference clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen, although the legislature has prescribed A a limit of three years for the enforcement of such a claim in any application that might be made to the law courts.

In the circumstances of this case as above-stated, it is, I think, impossible to come to the conclusion that there was an implied agreement between the parties to exclude any defence under any Statute of Limitations. B In the absence of such an implied agreement, the Limitation Act was open to the respondents, and the consequence must follow that the arbitrator was acting rightly in admitting the defence under the statute.

The second question can be dealt with more briefly. If the submission C quoted above be carefully examined, it will be observed that, if either of the parties should not name an arbitrator within 21 days from the date of the notice by one of the parties, the other arbitrator is to be competent to arbitrate alone. The necessary implication is that there is *then* a duly nominated arbitrator. That is, the clause must mean that D the party calling upon the other to nominate an arbitrator must himself at the same time nominate, or have previously nominated, an arbitrator ; and this is plainly the usual practice, for it would be a most unusual proceeding for the party claiming redress by arbitration to call on the party defending to nominate his arbitrator first. If, however, there E were any room for doubt on this point, it would be removed by the correspondence above-stated or referred to, from which it is plain that the appellants on June 28, 1932, accepted the contention put forward by the respondents, and stated that they hoped to name their arbitrator in the near future. In these circumstances, and no arbitrator having F been named by either party, I can see no good ground for holding that the proceedings by arbitration commenced before Oct. 20, 1932, when the agreement to refer the dispute to a single named arbitrator was entered into.

My Lords, I have stated in my own language the conclusions at which G I have arrived. It will be seen that they are those of the arbitrator, the judge and the Court of Appeal, and in substance for the same reasons. In the result, I am of opinion that the appeal fails, and must be dismissed.

LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN and H LORD MACMILLAN all concurred.

Appeal dismissed.

Solicitors : *Richards, Butler, Stokes & Woodham Smith* (for the appellants) ; *Sinclair, Roche & Temperley* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ZETLAND (MARQUESS) AND ZETLAND ESTATES COMPANY *v.* DRIVER AND ANOTHER.

[Court of Appeal (Sir Wilfrid Greene, M.R., Luxmoore and Farwell, JJ.), **February 3, 4, 7, 8, March 17, 1938.]**

Sale of Land—Restrictive covenants—Benefit of land unsold—Annexation of benefit—Touching or concerning the land.

A conveyance of shop premises, being a small portion of a large area of settled land, contained the following covenant: "The purchaser to the intent and so as to bind so far as practicable the property hereby conveyed into whosesoever hands the same may come and to benefit and protect such part or parts of the lands now subject to the settlement (*a*) as shall for the time being remain unsold or (*b*) as shall be sold by the vendor or his successors in title with the express benefit of this covenant covenants with the vendor that the purchaser will at all times observe . . ." in particular that "no act or thing shall be done or permitted on the said land which in the opinion of the vendor may be a public or private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood." The vendor having died, the first plaintiff succeeded as tenant in tail in possession under the settlement. The first plaintiff then conveyed the premises in fee to the defendant, who, having notice of the covenant entered into by his predecessor in title, used the premises for the purpose of a fried-fish shop. The plaintiffs now sought to enforce the covenant, alleging it to have been broken by such user:—

Held: (i) in forming his opinion as to whether the act complained of was a nuisance or prejudicial to himself or the owners or occupiers of adjoining property or the neighbourhood, the first plaintiff was in no sense performing a judicial or quasi-judicial act, and was under no obligation to give the defendants an opportunity of being heard.

(ii) the act complained of must be detrimental to the unsold land of the vendor, and it is not sufficient that it should be detrimental to an adjoining owner or the neighbourhood.

(iii) the rule against perpetuities in no way applied to this covenant.

(iv) distinguishing *Re Ballard's Conveyance* (4) the covenant here was enforceable, since it was expressed to be for the benefit of the whole or any part or parts of the unsold settled property, and not for that of the whole estate.

[**EDITORIAL NOTE.** The importance of this decision is that the case of *Re Ballard's Conveyance* (4) is here distinguished, upon the ground that in that case the covenant was taken for the benefit of the whole of the vendor's estate. Here the benefit is for the benefit of the unsold portion only. As the unsold portion may be far distant from the premises in question, and quite unaffected by the frying of fish thereon, this seems to strike at the *ratio decidendi* in *Re Ballard's Conveyance* (4), but the expression of any opinion upon that case is here expressly avoided.

As to Restrictive Covenants, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, pp. 454-458, paras. 827-832; and for Cases, see DIGEST, Vol. 40, pp. 310-314, Nos. 2648-2675.]

Cases referred to:

(1) *Labouchere* v. *Wharncliffe* (*Earl*) (1879), 13 Ch.D. 346; 8 Digest 509, *24*; 41 L.T. 638.

(2) *Dawkins* v. *Antrobus* (1881), 17 Ch.D. 615; 8 Digest 507, *18*; 44 L.T. 557; *affg.* (1879), 41 L.T. 490.

(3) *Osborne* v. *Bradley*, [1903] 2 Ch. 446; 40 Digest 329, *2780*; 73 L.J.Ch. 49; 89 L.T. 11.

(4) *Re Ballard's Conveyance*, [1937] Ch. 473; [1937] 2 All E.R. 691; Digest Supp.; 106 L.J.Ch. 273; 157 L.T. 281.

APPEAL from an order of BENNETT, J., dated July 29, 1937, and reported in [1937] 3 All E.R. 795. The facts are fully set out in the judgment of the court delivered by FARWELL, J.

Cyril J. Radcliffe, K.C., and *J. Neville Gray* for the appellants.

F. R. Evershed, K.C., and *B. S. Tatham* for the respondents.

A

FARWELL, J. [delivering the judgment of the court]: This is an appeal by the plaintiffs from an order of BENNETT, J., dated July 29, 1937, dismissing the action with costs. The first appellant (hereinafter referred to as the appellant) is the estate-owner in fee simple of certain B lands and hereditaments in Redcar in the county of York, and the beneficial interest in the property is vested in the second appellant during the appellant's life.

By a settlement dated Aug. 2, 1871 (hereinafter referred to as the settlement), and made between the then Earl of Zetland of the first part, C the first Marquess of Zetland (then and therein called Lawrence Dundas) of the second part, Lady Lilian Selina Elizabeth Lumley of the third part, Lord John Manners and Edgar Atheling Drummond of the fourth part, and Charles William Wentworth Fitzwilliam, John Charles Dundas, Viscount Newport, and Alfred Manners Drummond of the fifth part, D certain lands and hereditaments in the North Riding of Yorkshire, including therein lands and hereditaments in Redcar in the said Riding, were settled to uses under which the late Marquess of Zetland was in 1928 tenant for life in possession and the appellant tenant in tail male in remainder.

E By a conveyance dated Sept. 10, 1928, and made between the late Marquess (therein called the vendor) of the first part, Lord Southampton and the Earl of Scarborough (thereinafter called the trustee) of the second part, and David Frederick Goodswen (thereinafter called the purchaser) of the third part, after reciting the settlement and that the vendor was F tenant for life in possession thereunder and that the trustees were the trustees for the purposes of the Settled Land Act, 1925, and a vesting deed dated June 15, 1926, the vendor for the consideration therein mentioned conveyed unto the purchaser in fee simple, but with certain exceptions and reservations therein mentioned, a piece or parcel of land G in Redcar therein described and now known as No. 200, Lord Street, Redcar, subject to the stipulations contained in the second schedule thereto. By cl. 2 of the conveyance it was provided that the purchaser to the intent and so as to bind so far as practicable the property so conveyed into whosesoever hands it might come and to benefit and protect such H part or parts of the lands in the borough, township or parish of Redcar then subject to the settlement as should for the time being remain unsold or as should have been sold by the vendor or his successors in title with the express benefit of the covenants covenanted that he would at all times observe perform and keep the stipulations contained in the second schedule thereto. The second schedule provided, *inter alia*, that the expression vendor should include, where the context admitted, the successors in title of the vendor, and contained in cll. A, B, C, and E, covenants as to the buildings to be erected and other works to be done on the land sold. By cl. D it was provided as follows :

> That no intoxicating or spirituous liquors shall be sold from the premises and in particular that no part of the land hereby conveyed shall be used for the purpose of a club and that no act or thing shall be done or permitted thereon which in the opinion of the vendor may be a public or private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood.

This covenant was duly registered as a land charge.

On Mar. 11, 1929, the first Marquess died, and the appellant thereupon became entitled in possession as tenant in tail male to the hereditaments comprised in the settlement. At that date, and at all material times thereafter, portions of the land and hereditaments at Redcar were unsold, and remained subject to the settlement.

On Apr. 2, 1935, the property No. 200, Lord Street, Redcar, was conveyed to the first respondent, and he and the second respondent have since that time carried on on the premises the business of an eating-house for the consumption of fried fish and food on the premises. In Apr., 1936, the respondents obtained a licence from the local authority authorising the sale of fried fish for consumption off the premises, and since that date they have carried on such business on the premises, in addition to the business theretofore carried on by them.

As a result of certain complaints as to the carrying on by the respondents of the business of selling fried fish for consumption off the premises, the appellant formed the opinion that such business was detrimental to the amenities of the neighbourhood and to his own property, and the respondents were duly informed of this, and requested to give up the business, but they refused so to do. Accordingly, this action was commenced, by which the appellant claims an injunction to restrain the respondents, their servants, workmen or agents, from using any part of the premises No. 200, Lord Street, for the frying of fish or other substances for consumption off the premises, or for doing or permitting any other act or thing which, in the opinion of the appellant or other the successor in title of the late Marquess, may be a public or private nuisance, or prejudicial or detrimental to the appellant or his successor in title as aforesaid, and to the owners or occupiers of any adjoining premises, or to the neighbourhood. The respondents by their defence put in issue the right of the appellant to enforce the covenant. They deny that the business complained of is a breach of the covenant. They further say that the opinion of the appellant was wholly unreasonable and capricious, and that in forming an opinion he was acting in a quasi-judicial capacity, and was therefore bound to give the respondents an opportunity of being heard before coming to any conclusion, and that this he has failed to do. In addition, they plead laches and acquiescence as a bar to the relief sought.

It will be convenient to dispose at once of those last-mentioned pleas. In our judgment, there is no foundation for the plea of laches or acquiescence, nor is there anything in the evidence to support the contention that the opinion which the appellant formed as to the respondents' business was capricious, or other than a *bona fide* opinion formed after a
A proper consideration of the facts. In forming his opinion, the appellant was in no sense exercising a judicial or quasi-judicial function, and he was therefore under no obligation to give the respondents an opportunity of being heard. The club cases, such as *Labouchere* v. *Wharncliffe (Earl)* (1) and *Dawkins* v. *Antrobus* (2), which were much relied on by
B the respondents, have no application to this case.

There remains to be considered the real issue in this appeal—namely, whether the covenant is enforceable by the appellant. Covenants restricting the user of land imposed by a vendor upon a sale fall into three classes: (i) covenants imposed by the vendor for his own benefit,
C (ii) covenants imposed by the vendor as owner of other land of which that sold formed a part, and intended to protect or benefit such unsold land, and (iii) covenants imposed by a vendor upon a sale of land to various purchasers who are intended mutually to enjoy the benefit of, and be bound by, the covenants: *Osborne* v. *Bradley* (3). Covenants
D of the first class are personal to the vendor, and enforceable by him alone, unless expressly assigned by him. Covenants of the second class are said to run with the land, and are enforceable without express assignment by the owner for the time being of the land for the benefit of which they were imposed. Covenants of the third class are most usually found in
E sales under building schemes, although not strictly confined to such sales. It is not suggested that the present covenant falls within this class. Nor will it assist the appellant if it falls within the first class, since he was not the original covenantee nor an express assignee from him. If, therefore, the appellant is entitled to sue on this covenant, it must fall
F within the second class above-mentioned.

Such covenants can only be validly imposed if they comply with certain conditions. First, they must be negative covenants. No affirmative covenant requiring the expenditure of money, or the doing of some act, can ever be made to run with the land. Secondly, the covenant must
G be one that touches or concerns the land, by which is meant that it must be imposed for the benefit, or to enhance the value, of the land retained by the vendor, or some part of it, and no such covenant can ever be imposed if the sale comprises the whole of the vendor's land. Further, the land retained by the vendor must be such as to be capable of being
H benefited by the covenant at the time when it is imposed. Thirdly, the land which is intended to be so benefited must be so defined as to be easily ascertainable, and the fact that the covenant is imposed for the benefit of that particular land should be stated in the conveyance, and the persons or the class of persons entitled to enforce it should also be so stated. The fact that the benefit of the covenant is not intended to

pass to all persons into whose hands the unsold land may come is not objectionable, so long as the class of persons intended to have the benefit of the covenant is clearly defined. Finally, it must be remembered that those covenants can only be enforced so long as the covenantee or his successor in title retains some part of the land for the benefit of which the covenant was imposed. Applying those conditions to the present case, the covenant sued upon appears to comply with them. The covenant is restrictive. It is expressly stated in the conveyance to be for the benefit of the unsold part of the land comprised in the settlement, and such land is easily ascertainable. It is not suggested that at the date of the conveyance the land retained was not capable of being benefited by the restrictions, and, lastly, the appellant is the successor in title of the original covenantee, and, as such, is the estate-owner of part of the land unsold which is subject to the settlement. That being so, the appellant is the person now entitled to the benefit of the covenant, and, *prima facie*, is entitled to enforce it against the respondents, who, although not the original covenantors, took their land with notice of the restrictions, and are, therefore, bound by them.

It is said, however, on behalf of the respondents, that this covenant is not one which can run with the land, because it is imposed, not only for the benefit of the unsold land of the vendor, but also for the benefit of the adjoining owners and the neighbourhood. If that were the true construction of the covenant, that might be so, but in our judgment, reading the covenant as a whole, it cannot be so construed. The paramount purpose of the covenant, as appears from the conveyance itself, is to benefit and protect the unsold land of the vendor, and only such acts or things as are, in the opinion of the appellant or his successors in title, injurious to that land are within the restrictions. Consequently, nothing which would be a nuisance or annoyance to an adjoining owner or the neighbourhood is within the covenant, unless it is also detrimental or injurious to the unsold land of the vendor. The covenant is, therefore, not impeachable on this ground. Then it was said that it was open to objection as offending the rule against perpetuities, but, in our judgment, there is no ground for such contention. The formation of an opinion by a successor in title of the original vendor, at whatever time, cannot operate to create any new estate or revest the land, and, consequently, the rule against perpetuities has no application.

In those circumstances, there does not appear to be any ground on which the appellant can properly be refused the relief which he seeks. Bennett, J., however, took the opposite view, and held that the benefit of the covenant had not passed to the appellant. In coming to that conclusion, he founded himself upon a decision of Clauson, J., in *Re Ballard's Conveyance* (4), which he considered to be exactly in point, and binding upon him. In our judgment, the judge was wrong in thinking that *Re Ballard's Conveyance* (4) was an authority in this case. It is not necessary for us, and we do not propose, to express any opinion as to that decision, beyond saying that it is clearly distinguishable from the present case, if only on the ground that in that case the covenant was expressed to run with the whole estate, whereas in the present case no such difficulty arises, because the covenant is expressed to be for the benefit of the whole or any part or parts of the unsold settled property.

A It is to be noticed in the present case that the benefit of the covenant is not intended to pass to a purchaser without express assignment. It is not necessary for us to express any opinion as to what would be the effect of a sale of part of the settled property with an express assignment of the covenant, but, if such a purchaser could enforce the covenant, it
B could only be for so long as some successor in title of the original covenantee retained some part of the settled property, since such a person alone can form the requisite opinion. For these reasons, the appeal must be allowed. The appellant is entitled to the injunction which he seeks, subject to two limitations. In the first place, the injunction must be limited to fried fish,
C and the words " other substances " must be deleted, because the opinion of the appellant as to the nuisance was confined to fried fish, and, secondly, the period of the injunction must be confined to so long as the appellant or some other successor in title of the vendor retains unsold any part of the settled property for the benefit of which the covenant was imposed.
D Subject to those two alterations, there will be an injunction in the terms of the prayer in the statement of claim, and the respondents must pay the costs here and below.

Solicitors: *Frere, Cholmeley & Co.* (for the appellants); *H. E. Griffith & Son*, agents for *Miles, Hutchinson & Lithgow*, Middlesbrough (for the
E respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

F
Re NEWHILL COMPULSORY PURCHASE ORDER, 1937, PAYNE'S APPLICATION.

[KING'S BENCH DIVISION (du Parcq, J.), **March 9, 1938.]**

Public Health– Compulsory purchase—" Park, garden or pleasure ground "—" Required for the amenity or convenience of any house "—Housing Act,
G *1936 (c. 51), s. 75.*

For the purpose of building houses, a local authority made an order for the compulsory purchase of a field some 70 yds. distant from a mansion, and mainly used for pasturing stock. The field had also been used from time to time for the festivities of local societies, and the children of the village were allowed to play there at such times. It was contended that the land was part of a park, garden or pleasure ground,
H or was otherwise required for the amenity or convenience of the mansion:—

HELD: the land in question was not part of any park, garden or pleasure ground, nor was it required for the amenity or convenience of the mansion, and the order was properly made.

[EDITORIAL NOTE. It may well be that the question as to what is included in the park of a mansion is a question of fact, but, even if that is so, the observations in the judgment in this case are of considerable importance in any consideration of the matter, and the judgment goes on to deal with the construction of the Housing Act, 1936, s. 75.

AS TO CONDITIONS OF ACQUISITION OF LAND FOR HOUSING PURPOSES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 562-564, para. 1185; FOR THE HOUSING ACT, 1936, s. 75, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 29, p. 622.]

Case referred to:

(1) *Pease* v. *Courtney*, [1904] 2 Ch. 503; 40 Digest 746, *2766*; 73 L.J. Ch. 760: 91 L.T. 341.

APPLICATION that a compulsory purchase order providing for the purchase of part of the land of Newhill Hall might be quashed, upon the ground that the land ordered to be purchased compulsorily was part of the park of Newhill Hall, and therefore exempt from the operation of such an order by the Housing Act, 1936, s. 75.

The land in question was a field enclosed on the side nearest to the Hall by a post-and-rail fence running parallel to the front of the Hall The point where the fence was nearest to the Hall was some 70 yds. distant from the Hall, and the intervening land was wooded, so that any houses built would be largely obscured from view. The field had been used for recreational purposes, and a number of mares and foals had from time to time been turned into it. The outer edge of the field and the wooded land were enclosed by a stone wall.

A. Capewell for the appellants.

Valentine Holmes for the respondent.

DU PARCQ, J.: This application is made in pursuance of the second schedule of the Housing Act, 1936, by persons whose land it is proposed compulsorily to acquire for the purposes of Part V of the Housing Act, 1936. That part of the Act deals with the provisions of housing accommodation for the working classes. The Minister has confirmed the decision of the local authority compulsorily to acquire certain land which, it is said on behalf of the applicants, includes land which cannot be acquired compulsorily by reason of the provisions of sect. 75 of the Act. I do not think that it will be necessary for me to deal with all the questions which may in the future arise under that section. The section provides as follows:

> Nothing in this Act shall authorise the compulsory acquisition for the purposes of this Part of this Act of any land which is the property of any local authority . . . or which at the date of the compulsory purchase order forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house.

Mr. Capewell, in his interesting and able argument for the appellants, says that, but for sect. 3 of the second schedule of the Act, he would have been entitled to a writ of prohibition to prevent the acquisition of this land, but, as it is, he has to come to this court in order that the order may be quashed.

It is desirable to see exactly what the powers of this court are. Sect. 2 of the second schedule provides that, upon an application being duly made, the court, if satisfied upon the hearing of the application that the order is not within the powers of the Act, may quash the order, either generally or in so far as it affects any property of the applicant. The question is whether I am satisfied, or ought to be satisfied upon the materials before me, that the order is not within the powers of this Act. In other words, is there enough before me to satisfy me that this land forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house? I do not think that I need decide whether it would be enough to say that the land formed part of a park or a pleasure ground, without going on to say that, as such, it was required for the amenity or convenience of a house. Mr. Capewell says that the local authority, before they think of compulsory acquisition of land, ought to satisfy themselves (i) that it is not a park, (ii) that it is not a garden, (iii) that it is not a pleasure ground, (iv) that it is not required, though it may be none of those things, for the amenity of a house, and (v) that, though it may be none of those things, it is not required for the convenience of any house. Mr. Valentine Holmes, on the other hand, submits that, upon its true construction, what the section means is that land may not be acquired if it is required for the amenity or convenience of a house, either as being a park adjacent to the house, or a garden or a pleasure ground adjacent to the house, or some other similar parcel of land also required for the amenity or convenience of the house, and he says that Mr. Capewell's construction gives no meaning to the word "otherwise." I think that, for the purposes of this judgment, I may assume, though I am far from deciding, that Mr. Capewell's construction is the right one. I say I am not deciding that, and I do not wish it to be thought that I am expressing approval of it, or saying that the construction suggested by Mr. Holmes is not the correct one. I leave the point open.

It is not suggested that this piece of land is a garden. What is said is that it is a park, that it is also, or alternatively, a pleasure ground, and that it is certainly required for the amenity or convenience of the house. I think that questions of some difficulty may arise—I do not say for the moment whether it will be for this court to decide them—concerning the precise meaning of the words "park" and "pleasure ground," or rather, not so much concerning the meaning of the words as concerning the question of fact as to whether a given parcel of land comes within the definition. I am clear that the word "park" in this Act has not the meaning which it had centuries ago in the English language and in early legal textbooks. Those who are curious about the matter will find those early meanings set out in Stroud's Judicial Dictionary. Swinfen Eady, J., in *Pease* v. *Courtney* (1) said, at p. 509, that the Settled Land Acts, which also contained the words "park" and "pleasure ground," did not use the word "park" in its legal or technical sense, but according to its ordinary and natural meaning in common parlance. I think that in this Act also the word "park" is used according to its ordinary and natural meaning in common parlance, and I should be content to accept, as SWINFEN EADY, J., accepted for the purposes of those Acts, the definition which he took from the Imperial Dictionary :

> A considerable extent of pasture and woodland, surrounding or adjoining a A mansion-house, devoted to purposes of recreation or enjoyment, but chiefly to the support of a herd of deer, though sometimes to cattle and sheep.

I do not propose to attempt any definition of the words "pleasure ground." It is enough to say that the mere fact that a vacant piece of land in the neighbourhood of a house is sometimes used to procure B amusement for neighbours, be they schoolchildren or others, is not enough to constitute it a pleasure ground, according to the ordinary use of the English language.

I answer the question which I have propounded for myself shortly by saying that I am not satisfied, on the evidence before me, that this land C did form part of either a park or a pleasure ground, or that it was required for the amenity or convenience of Newhill Hall. No doubt at times mares and ponies have been turned out on this part of the estate, and there is some slight evidence that cattle may have been there, though I am not sure that Mr. Payne in his affidavit says so very distinctly. He D says that he has bred cattle and has from time to time had mares and ponies in this part of the park. I should feel considerable doubt, upon the evidence before me, as to whether it could be said that this piece of land, a photograph of a part of which I have before me, could be described as a park within the definition I have read. That question has been E considered by the Minister of Health and those to whom he delegates his powers, and I have it upon the affidavit of Mr. Wrigley that it is considered that the land does not form part of the park of Newhill Hall. It certainly does not form part of any other park, and I am not prepared to say that that view of the evidence before the Minister was wrong, either F that the Minister has taken a wrong view about the definition of a park, or that he has come to an erroneous conclusion of fact. As to its being a pleasure ground, I am satisfied that it does not come within the meaning of that term as it is used in this Act. Of course, it is pleasant to have land round a house. It is pleasant to know that houses cannot be built G near one's house. It is pleasant to look out upon green and open spaces. That fact does not make the open spaces pleasure grounds, however, and, when I find that it is common for this gentleman—and I need hardly say that it is most laudable conduct on his part—to allow other persons, societies and clubs, and so on, to use this land for sports and games, and H that he himself has used it, apparently, so far as he has used it at all, chiefly to accommodate horses, I feel that those facts do not indicate that it is a pleasure ground, but rather the reverse. A place into which the occupier of the house permits others to come in order that they may play football or games, or run races, is not, I think, within the meaning in this Act of the words "pleasure ground." Even if I am wrong about that, it is enough to say that the evidence does not satisfy me that the Minister was wrong when he came to the conclusion, as again Mr. Wrigley's affidavit shows that he did, that it was not a pleasure ground.

That leaves only the question as to whether it was required for the amenity of the house or the convenience of the house, and there, whatever the local authority may have done or failed to do, the Minister has formed the opinion, as I understand Mr. Wrigley's affidavit, that the land was not required either for the amenities or for the convenience of the house. I call attention to the word "required." The use of it raises a question of fact which is necessarily a difficult one. Again, I do not wish to repeat myself, but one has to remember that it is pleasant, and, one may say, both an amenity and a convenience, to have a good deal of open space round one's house, but it does not follow that that open space is required for the amenity or the convenience of the house. "Required," I think, in this section does not mean merely that the occupiers of the house would like to have it, or that they would miss it if they lost it, or that anyone proposing to buy the house would think less of the house without it than he would if it was preserved to it. "Required" means, I suppose, that without it there will be such a substantial deprivation of amenities or convenience that a real injury will be done to the property owner, and a question like that is obviously a question of fact. The Minister having made up his mind about it, as far as I can tell, on proper materials, and without misdirecting himself as to the true point at issue, it is not for me to interfere, when there are no materials upon which I can interfere. Nobody, whatever their views on subjects such as this, can help having some sympathy with a gentleman who finds that there is to be some interference with an old property, an ancestral home, and one which, according to his evidence—which I have not the slightest reason to doubt—he has occupied, as his forebears have occupied it, not only to his own enjoyment, but also with an eye to the happiness and enjoyment of his poorer neighbours. I, of course, cannot allow myself to be influenced by considerations such as that, however, and I suppose that it is impossible for the local authority or the Minister to be influenced by considerations such as that, if they feel, as I must assume that they have felt, that there are over-riding considerations of public welfare. In those circumstances, the application must be dismissed.

Application dismissed with costs.

Solicitors: *Steavenson & Couldwell*, agents for *Rodgers & Co.*, Sheffield (for the appellants); *Solicitor to the Ministry of Health* (for the respondent).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

TRIM *v.* STURMINSTER RURAL DISTRICT COUNCIL.

[Court of Appeal (Greer, Slesser and MacKinnon, L.JJ.), **March 17, 1938.**]

Public Health—Housing—Demolition order—House suitable for occupation by persons of the working classes—Whether "house" can include 10 *acres of grassland—Housing Act,* 1936 (*c.* 51), *s.* 188.

A local authority made a demolition order in respect of a house, which was usually let together with cow-stalls, farm-buildings, and about 10 acres of grassland. The county court judge, in considering whether the house was one suitable for occupation by persons of the working classes, held that he was entitled to treat the 10 acres as appurtenant to the house :—

Held : the word "appurtenances" in the definition of "house" contained in the Housing Act, 1936, s. 188, must be given its natural meaning, and cannot be extended to cover land outside the curtilage of the house.

[**EDITORIAL NOTE.** The decision here is made on the definition of the "appurtenances of a house" in the Housing Act, and particularly upon the extent of the premises covered by that term.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 26, p. 534, note (*q*) ; and for Cases, see DIGEST, Vol. 17, pp. 377, 378, Nos. 1865-1876.]

Cases referred to :

(1) *Bryan* v. *Wetherhead* (1625), Cro. Car. 17 ; 17 Digest 378, *1871.*

(2) *B. Aerodrome, Ltd.* v. *Dell,* [1917] 2 K.B. 380 ; 42 Digest 645, *502* ; *sub nom. Brighton-Shoreham Aerodrome, Ltd.* v. *Dell,* 86 L.J.K.B. 1331 ; 117 L.T. 272.

(3) *Grant* v. *Langston,* [1900] A.C. 383.

(4) *Lewin* v. *End,* [1906] A.C. 299 ; 30 Digest 183, *511* ; 75 L.J.K.B. 473 ; 94 L.T. 649 ; *revsg.* S.C., [1905] 1 K.B. 669.

(5) *Lister* v. *Pickford* (1865), 34 Beav. 576 ; 17 Digest 377, *1867* ; 34 L.J.Ch. 582 ; 12 L.T. 587.

(6) *Bettisworth's Case, Hayward* v. *Bettisworth* (1580), 2 Co. Rep. 31b ; 17 Digest 377, *1869.*

(7) *Smithson* v. *Cage* (1619), Cro. Jac. 526 ; 17 Digest 378, *1870.*

(8) *Thomas* v. *Owen* (1887), 20 Q.B.D. 225 ; 19 Digest 34, *166* ; 57 L.J.Q.B. 198 ; 58 L.T. 162.

(9) *Bayley* v. *Great Western Ry. Co.* (1884), 26 Ch.D. 434 ; 19 Digest 35, *178* ; 51 L.T. 337.

Appeal under the Housing Act, 1936, s. 15, from a decision of His Honour Judge Cave at the Blandford County Court, dated Oct. 27, 1937. The facts of the case are fully set out in the judgment of Slesser, L.J. The case first came on for hearing in the Court of Appeal before Slesser, Scott, and Clauson, L.JJ., on Feb. 4, 1938, but was remitted to the county court judge in order that he might give the reasons for his finding.

H. Heathcote-Williams for the appellants.

J. Scott Henderson for the responents.

Heathcote-Williams : The question is, do these premises constitute a house within the meaning of the Housing Acts ? It is admitted that the word "house" has an ambiguous meaning. [Counsel referred to *B. Aerodrome, Ltd.* v. *Dell* (2), *Grant* v. *Langston* (3), and *Lewin* v. *End* (4).]

In this Act " house " means a building suitable for habitation. These 10 acres cannot be an appurtenance. Appurtenance means gardens and curtilage generally. Its meaning was discussed in *Lister* v. *Pickford* (5). It is well-settled that land cannot be appurtenant to land or to a messuage. The term includes incorporeal hereditaments such as rights of way: *Bettisworth's Case*, *Hayward* v. *Bettisworth* (6) and *Smithson* v. *Cage* (7). It is admitted that, where there is a will or a contract, and it is obvious that the parties have given a special meaning to the word, then the proper meaning may be departed from and a special meaning given: *Thomas* v. *Owen* (8) and *Bayley* v. *Great Western Ry. Co.* (9). In this case, there is no reason for departing from the proper meaning of the word.

Scott Henderson: It is always a question of fact for a local authority, or, on appeal, for the judge, as to whether or not a house which is unoccupied is a house suitable for occupation by the working classes. The judge has had the other outbuildings in mind—cow-stalls and farm-buildings. They must certainly be included. The words in the section, " belonging thereto and usually enjoyed therewith," must be given some meaning, and the judge was entitled to consider the 10 acres. He was not limited to the house, but could consider all the surrounding circumstances, including the 10 acres, in order to decide whether this was a house suitable for habitation by the working classes.

Heathcote-Williams was not called on in reply.

Greer, L.J.: I will ask my brother Slesser, L.J., to deliver his judgment first, as he was present on the previous occasion.

Slesser, L.J.: This case raises a question with regard to the definition of " house " in the Housing Act, 1936, s. 188. The word " house " is there defined as including:

> any yard, garden, outhouses, and appurtenances belonging thereto or usually enjoyed therewith.

The matter came before the county court judge on an appeal from a demolition order made by the local authority, and the substance of the appeal was founded upon the consideration that, when the house, together with the 10 acres of grassland which were at all material times occupied with it and let with it, were taken into consideration, the proper conclusion was that this was not a house suitable for occupation by persons of the working classes, within the meaning of the Housing Acts. It was not certain, upon the first hearing, upon what principle the county court judge came to the conclusion at which he did arrive, that this order ought not to have been made, upon the basis that he was not satisfied that this house, to which the order purported to apply, was a house suitable for occupation by persons of the working classes within the meaning of the Act. The case was therefore remitted to him for a further statement as to the reasons for his judgment.

We have now before us that statement, in which he says:

> The premises in question are a small dwelling-house of about 6 rooms situate at Sturminster-Newton in the county of Dorset. Appurtenant to the house and at all material times occupied therewith are 10 acres of grassland, cow-stalls, capable of accommodating 10 or 12 cows, and other farm-buildings. All these premises have for years past been let together upon a yearly tenancy at a rent of £30 per annum formerly to a person carrying on the business of a dairy farmer, latterly to a person carrying on the business of a poultry farmer.

Then he says that he understood the contention of the respondent—the local authority—to be:

> that the house was " of a type suitable " for occupation by such persons, and that in deciding whether that was so or not I ought to have regard only to the size of the house itself. That argument seemed to me to be inconsistent with the definition of " house " in sect. 188 of the Act. . . . I took the view that no persons of the working classes as so described would either take this house and its appurtenances on an annual tenancy or be accepted as tenant by the owner.

As he had already said that appurtenant to the house are 10 acres of grassland, and cow-stalls capable of accommodating 10 or 12 cows, it must be taken that he has arrived at his conclusion upon the basis that the " house " within the meaning of the Act may properly be taken to include the 10 acres of grassland, the cow-stalls, and the like.

The question for the decision of this court is whether, in coming to that conclusion, he was correct in law. In my opinion, the judge was wrong in law in coming to any such conclusion. In the definition to which I have referred, certain specific matters are mentioned—that is to say, any yard, garden and outhouses—and then follows the word " appurtenances." The word " appurtenances " has had applied to it, through a long series of cases mostly dealing with the question of the meaning of the word in demises, a certain limited meaning, and it is now beyond question that, broadly speaking, nothing will pass, in the case of a demise, under the word " appurtenances " which would not equally pass under a conveyance of the principal subject-matter without the word " appurtenances." That is to say, as pointed out in the early case of *Bryan* v. *Wetherhead* (1), in 1623, the word " appurtenances " will pass with the house, the orchard, yard, curtilage and gardens, but not the land, and that view, as far as I have understood the authorities, has never been departed from, except that in certain cases it has been held, on the material in those cases, that the word " appurtenances " may be competent to pass incorporeal hereditaments, but no case has been cited to us in which the word " appurtenances " has ever been extended to include land which does not fall within the curtilage of the yard of the house itself—that is, within the parcel of the demise of the house.

In those circumstances, it seems to me that, there being no reason to construe the word " appurtenances " in this case otherwise than in its ordinary and natural meaning, the county court judge was wrong in holding that the word " appurtenances " included the 10 acres. Exactly how much of the adjacent land ought to be included in the word " appurtenances" depends on the facts of the particular case. As I have said, it may include orchards, yard, curtilage and gardens. It is a matter for the judge to decide, but he must confine his consideration, in taking account of whether or not this house is suitable for occupation by persons of the working classes, only to such matters, which, on the face of it, would be something considerably less than the whole of the 10 acres.

There remains open for his consideration, upon a proper consideration of the subject-matter as thus indicated, the question as to whether or not that subject-matter is suitable for occupation by persons of the working classes. That is a matter which it is for the judge to determine, and which, so far, has not been determined upon a proper basis in this case. Therefore I am of opinion that this case must go back to him, and it is for him, limiting his consideration to the matters which I have indicated, having regard to the authorities which indicate the extent to which the word "appurtenances" may be used, to come to a conclusion as to whether or not this order is properly made by the local authority.

GREER, L.J. : I agree, and the case is remitted to the county court judge for trial. Upon the evidence before him, he may have to decide whether or not part of the curtilage, with the sheds and other buildings upon it, may be part of the curtilage of the house, and, if he so decides, then he must take that matter into consideration in deciding whether or not the house, with its appurtenances, is a house which is suitable for occupation by the working classes. We do not exclude from his consideration the question as to whether at any rate some portion of the land may still be regarded as an appurtenance within the definition contained in sect. 188 of the statute.

MACKINNON, L.J. : I agree.

Appeal allowed with costs. Case remitted to the county court judge for further trial.

Solicitors : *Lovell, Son & Pitfield*, agents for *W. H. Creech*, Sturminster-Newton (for the appellants) ; *Rutter & Rutter*, Shaftesbury (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

JONES AND JONES v. NELSON.

[LIVERPOOL SPRING ASSIZES (Lewis, J.), **February 23, 25, 1938.**]

Landlord and Tenant—Fitness of property for human habitation—Condition implied by statute—Rent not exceeding £26 per annum—Whether inclusive or exclusive rent—Housing Act, 1936 (*c.* 51), *s.* 2.

Upon a claim based upon the condition implied by the Housing Act, 1936, s. 2, that a house was fit for human habitation, it appeared that the actual rent paid to the landlord was 12*s.* 6*d.* per week. This, however, included a sum of 3*s.* 8*d.* in respect of rates, so that the rent exclusive of rates was 8*s.* 10*d.* The Act required the premises to be let at a rent not exceeding £26 per annum in order that the benefit of the implied condition might attach :—

Held : the rent referred to in the Act was the rent exclusive of rates, and the condition of fitness for human habitation was to be implied.

[**EDITORIAL NOTE.** It will be noted that in this case Lewis, J., has expressly stated that he has not fully considered the point under the Housing Act, 1936, s. 2, and it cannot perhaps be regarded as a decisive authority upon the point. He has, however, expressed an opinion, which will no doubt guide the profession until a case arises in which the point has to be expressly decided.

As to Implied Condition of Fitness for Human Habitation, see HALSBURY, Hailsham Edn., Vol. 20, p. 204, para. 222 ; and for Cases, see DIGEST, Vol. 31, p. 181, Nos. 3158-3160.]

Case referred to :

(1) *Sheffield Waterworks Co.* v. *Bennett* (1872), L.R. 7 Exch. 409 ; 42 Digest 656, *648* ; 41 L.J.Ex. 233 ; 27 L.T. 199 ; *on appeal* (1873), L.R. 8 Exch. 196.

Action for damages for breach of contract. The house in which Mrs. Jones lived was the property of the defendant. On June 20, 1937, she was walking across the kitchen floor when her foot went through some of the boards, which gave way, and she received injuries. The plaintiff's contention was that the defendant had, through his agents, undertaken to repair the house and to refloor all the rooms. Mrs. Jones said that she had complained to the agents about the floor, but that nothing had been done. It was further contended that, even if there was no express warranty, it was an implied term of the tenancy under the Housing Act, 1936, that the premises should be left in all respects reasonably fit for habitation ; and also that, if the husband were held to be the tenant, damages were due to him for loss of his wife's services. *Inter alia*, it was raised by way of defence that the house in question did not come within the Housing Act, 1936, because the rent of 12*s.* 6*d.* a week (including rates) exceeded the statutory limit of £26 a year. In assessing the rent for the purposes of the Act, it was raised by way of reply that the rates payable by the landlord must be deducted, leaving in this case the rent at 8*s.* 10*d.* a week.

William Gorman, K.C., and *B. R. Rice-Jones* for the plaintiffs.

H. I. Nelson for the defendant.

Lewis, J. [His Lordship dealt as follows with the question of rent] : There is only one other point, and that is as to whether the house is a house which comes within the Housing Act, 1936, s. 2, which says :

> (1) In any contract for letting for human habitation a house at a rent not exceeding . . . (*b*) in the case of a house situate [outside the administrative county of London], £26 ; there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy . . . in all respects reasonably fit for human habitation.

That is the undertaking upon which this case is based. The question is : Is the rent at which this house is let a rent not exceeding £26 per annum ? The rent in ordinary words is 12*s.* 6*d.* a week, which would make the rent at which the house is let more than £26 a year, but rent in that section does not mean actually what the tenant pays out to the landlord. It means the value of the house. The facts are that the sum of 12*s.* 6*d.* rent was paid by the tenant, but that the landlord paid rates, and the rates paid by the landlord reduced to under 10*s.* a week the actual A amount that came to his (the landlord's) pocket. There is one further complication: on the landlord's undertaking to pay the rates punctually, the authority collecting the rates allowed him a rebate off the total amount. The result of that was that the net amount which came into his pocket from the house was something over 10*s.* a week.

B First, I do not think that that rebate ought to be considered. I think that that was a special arrangement which was made, and I do not think that one ought to consider that. The question which is put to me, and which I have to decide, is whether or not in this section of the Act "rent" means 12*s.* 6*d.* or 12*s.* 6*d.* less the rates.

C There is authority for saying that "rent payable" means what it says—namely, the amount which is given to the landlord—but that is not what the section says. The section says "rent," and I am inclined to the view that Mr. Gorman's point as to this is right, and that the word "rent" as used in this section is equivalent to annual value, or the D amount which actually comes into the landlord's pocket. I incline to this view upon a consideration of the decision of the court in *Sheffield Waterworks Co.* v. *Bennett* (1), where it was held that "rent" means the amount which comes into the landlord's pocket, and not the gross rent the tenant has to pay. The considerations in that case apply here, and I should E be prepared to hold that, in the circumstances, the house was a house within the Housing Act, 1936, s. 2. I say that that is my opinion. I have not considered it very carefully, because it seems to me quite unnecessary for me to do so as no notice that the house was getting out of repair was ever given, and therefore the landlord escapes the liability F for any breach of warranty there may be. In those circumstances, I give judgment for the defendant with costs.

Solicitors: *Silverman & Livermore* (for the plaintiffs); *Edward Lloyd* (for the defendant).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

G

Re JOHNSON, PEARSON *v.* JOHNSON.

[CHANCERY DIVISION (Simonds, J.), **March 18, 1938.**]

H *Charities—Subscriptions in response to appeal—For assistance of widow—Whether trustees can insist on the purchase of an annuity.*

A young man who was the only support of his widowed mother lost his life in attempting to save a child from drowning. A subscription list was opened to provide assistance for the mother. The greater part of the subscriptions were given in response to a letter published in certain newspapers, inviting people to provide "for the immediate needs of the widowed mother." A much smaller sum was given in response to a private letter in which the following words were used: "Subscriptions have come in very well to date, but you will realise that a sum of at least £500 is necessary to be of any use for investment purposes, to provide [the mother] with a small weekly pension." The trustees of the fund were anxious to purchase an annuity for the mother, but it was contended that the latter was entitled to have the whole fund handed over to her :—

Held : there was nowhere a sufficient expression of a trust to provide a pension, and the mother was entitled to have the fund handed over to her as her own absolute property.

[**EDITORIAL NOTE.** Funds are often collected for the relief of widows or other persons, and it is no doubt very desirable that in many cases of this kind the fund should be used to purchase an annuity rather than handed over as a lump sum. The question in such cases is, no doubt, purely one of construction, but the present decision will be found of considerable assistance to those called upon to draft or approve the terms of a letter inviting subscriptions for such an object.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 4, pp. 209, 210, para. 300; and for Cases, see DIGEST, Vol. 8, p. 334, Nos. 1202, 1203.]

Cases referred to :

(1) *Re Abbott Fund Trusts, Smith* v. *Abbott*, [1900] 2 Ch. 326; 8 Digest 334, *1202*; 69 L.J.Ch. 539.

(2) *Re Andrew's Trust, Carter* v. *Andrew*, [1905] 2 Ch. 48; 8 Digest 334, *1203*; 74 L.J.Ch. 462; 92 L.T. 766.

(3) *Re British Red Cross Balkan Fund, Britsh Red Cross Society* v. *Johnson*, [1914] 2 Ch. 419; 43 Digest 657, *906*; 84 L.J.Ch. 79; 111 L.T. 1069.

(4) *A.-G.* v. *Mathieson, Re Wilkinson & Fell's Contract*, [1907] 2 Ch. 383; 8 Digest 357, *1545*; 76 L.J.Ch. 682; 97 L.T. 450.

Originating Summons asking for the directions of the court as to the application of a fund collected by the plaintiffs for the benefit of the first defendant, whose son died in attempting to save the life of a child who fell into the river Leven at Great Ayton on Mar. 18, 1937. The summons asked whether the defendant Mrs. Johnson was absolutely entitled to the money in the hands of, or under the control of, the plaintiffs, or whether the plaintiffs held the fund upon trust to use the same at their discretion in or towards the support and benefit of Mrs. Johnson, and whether, in the event of the death of Mrs. Johnson before the fund was fully expended, the plaintiffs would hold the balance upon a resulting trust for the subscribers to the fund, or how otherwise.

A. Guest Mathews for the plaintiffs.

E. Milner Holland for the first defendant.

Hon. F. Howard for the second defendant, on behalf of himself and other subscribers.

Guest Matthews : If the court should decide that the subscribers to the fund would be entitled to any surplus remaining at Mrs. Johnson's death, it follows that she is not entitled to have the fund paid over to her at once. The real question in the case was whether the fund was not for the support of the lady during her life. If the proposals of the trustees were carried out, there would not be a surplus, because they would purchase an annuity. The trustees consider that they are acting in the best interests of the lady, and ask the court to say whether their view of the matter is right or whether the lady is entitled to have the money handed over to her. [Counsel referred to *Re Abbott Fund Trusts, Smith* v. *Abbott* (1), *Re Andrew's Trust, Carter* v. *Andrew* (2), *Re British Red Cross Balkan Fund, British Red Cross Society* v. *Johnson* (3), *A.-G.* v. *Mathieson* (4).]

Holland : It is perfectly clear that the money was subscribed for the benefit of Mrs. Johnson. No form of restriction was contemplated until after the fund had come into being. The way in which the case must rest is the determination of the trusts, if any, on which the funds were subscribed. The question is the nature of the terms upon which the money was subscribed, and not what the people who collected the money thought was the best thing to do. [Counsel was stopped by the court.]

SIMONDS, J. : In this case, a somewhat curious position has arisen on which the trustees have sought the directions of the court. In 1937, one Harold Johnson, then aged about 26 years, went into a river in order to save the life of a child who had fallen in, and he unfortunately sacrificed his own life in that attempt. He was the support, and the only support, of his mother, the defendant in these proceedings, who is a widow. Certain gentlemen in the locality, adopting, I think, and acting upon, the suggestion of the deputy coroner, formed themselves into a committee to collect a fund to provide for the unfortunate widow. In order to collect that fund, they adopted the means usual in such cases, but by far the greater part of the fund was collected by means of a letter addressed to certain papers in the North of England. The letter was in these terms :

> Sir,—With reference to the remarks of the deputy coroner, Mr. L. G. Appleby, made at the inquest on the victims of the Great Ayton drowning tragedy, we should like to intimate that a subscription list has been opened in the village to provide for the immediate needs of the widowed mother of Harold Johnson.
>
> Bearing in mind the heroic and self-sacrificing circumstances in which the unfortunate boy lost his life, we feel that many people outside the locality would like to make a donation to the fund.
>
> We, therefore, extend our appeal to all. Contributions, great or small, will be gratefully received and acknowledged. They may be sent to any of the undersigned or left at the buiness premises of Mr. W. Pearson, newsagent and tobacconist, who is acting as treasurer. The list will be closed on Apr. 5. May we hope that you will give publication to this appeal ?

This letter was signed by the four gentlemen who are the plaintiffs in these proceedings. A substantial sum—by far the greater part of the sum collected—was received in response to that letter. Certain other funds were also collected, however, and certain other small sums, amounting in all to some £50, were received in response to a private letter in which this expression is used :

> Subscriptions have come in very well to date, but you will realise, that a sum of at least £500 is necessary to be of any use for investment purposes, to provide Mrs. Johnson with a small weekly pension, and the committee therefore appeal to you to make your subscription as large as possible.

So far as I have been able to find out, that is the only suggestion that the support should take the form of a pension. In these circumstances, this question has arisen. A fund has been collected, and Mrs. Johnson says she is the owner of it, and is entitled to have it paid to her. The plaintiffs say that it is in their hands as trustees, and that it is for them to declare the trusts and to say how it shall be invested, and for them to say that, if they do not utilise the whole fund, there will be a resulting trust for the subscribers. That is the test as to whether they are right or wrong. If they are right, it follows that, if they have a discretion, and in the exercise of that discretion there is a part not utilised, I see no answer to the claim of the subscribers to the unexhausted part of the fund. I have been referred to several authorities, but they do not seem to assist me in this case. In the present case, there is a trust for the benefit of Mrs. Johnson. It is unqualified and absolute. The money was collected for Mrs. Johnson, and she is entitled to it. I can find nothing in the expression of the trust as to the mode of application.

In these circumstances, I think I ought to say that they have no doubt acted in the best interests of Mrs. Johnson herself—the plaintiffs, if they had their way, would purchase an annuity or dole out the money as they thought best. In the view I have formed, however, she is entitled to have the balance of the fund transferred to her, and I must declare accordingly.

As regards the costs of these proceedings, I think that it is to be regretted that any part of the fund should be applied to costs, but I cannot think that it is a case in which the trustees were not justified in taking the advice of the court. There are some authorities which seem to suggest that they were entitled to exercise a benevolent discretion. Accordingly, although I regret that the sum should be depleted in this way, I think that I must allow the costs of all parties as between solicitor and client out of this fund. The order will be, therefore, that the costs of all parties as between solicitor and client will be paid by the trustees, and that the balance will be handed over to Mrs. Johnson.

Solicitors: *Wm. White & Co.*, agents for *R. M. Beckwith*, Middlesborough (for the plaintiffs, and for the second defendant); *Elwell & Binford Hole*, agents for *Jacksons, Monk & Rowe*, Middlesborough (for the first defendant).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re VAUX, NICHOLSON *v.* VAUX.

[CHANCERY DIVISION (Simonds, J.), **January 25, 26, February 23, 24, 25, March 16, 1938.**]

Wills—Double portions—Satisfaction—Gift of shares in private company by settlement—Pecuniary legacy under will—Partial intestacy—Perpetuities—Trusts clearly void—Dealings to be within limits prescribed by law.

The testator by his will gave the income of his residuary estate unto his widow until death or re-marriage, and after her re-marriage he gave her an annuity of £500 per annum. Subject thereto the trustees were to set aside £20,000 for each of his daughters living at his death or born in due time thereafter, and these sums were settled in the usual way. The trustees were then given full discretion to deal with the capital and income of the residue in favour of the children and grandchildren. The will continued: "And I declare that my trustees may from time to time within the period of 21 years from my decease accumulate the surplus of any income of my residuary trust fund not paid or applied under the preceding clause of this my will by investing the same and the resulting income thereof to the intent that the accumulations shall be added to the residuary trust fund and follow the determination thereof with liberty nevertheless for the trustees at any time or times to resort to the accumulations of any preceding year or years and apply the same as part of my residuary trust fund." This clause was admittedly void for perpetuity, but it was contended that that result was prevented by the following words in the next clause: "Save only that all such dealings with the residuary trust fund and the income and accumulations thereof shall be within the limitations prescribed by law". The testator then expressed his views as to distribution of the residue, which were that it should go to his sons and their children, but so that no capital moneys should be paid to any son until he reached the age of 30 years. The testator later made a settlement of 8,000 preference shares of £5 each in a private company upon his four children, each child to have 2,000 shares settled upon him or her with cross-remainders. The testator died in Nov., 1925, and left two sons and two daughters him surviving:—

HELD: (i) the provisions of the settlement were a satisfaction of the legacies to the daughters, and those legacies were therefore adeemed.

(ii) the words "within the limitations prescribed by law" did not so limit and control the trusts in the previous clause as to prevent an infringement of the rule against perpetuity. The residuary gifts therefore failed, and there was a partial intestacy.

(iii) the rule against double portions, whereby the legacies were adeemed, applied, although there was a partial intestacy, but must be applied for the benefit of children only, and not for that of the widow, who for this purpose was to be regarded as a stranger.

[**EDITORIAL NOTE.** The question upon the doctrine of satisfaction raises these important questions: (*a*) whether shares can be a satisfaction of a pecuniary legacy; (*b*) if so, whether shares in a private company are not excluded by reason of the difficulties of valuation; (*c*) whether the doctrine applies to the case of a partial intestacy. On the perpetuity point the reference to "limitations prescribed by law" is held to be too vague a restriction to cause the previous trusts to be valid as not offending against the rule.

AS TO DOUBLE PORTIONS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 163-178, paras. 148-163; and FOR CASES, see DIGEST, Vol. 20, pp. 454-466, Nos. 1774-1928.

AS TO REFERENCES TO RULE AGAINST PERPETUITIES IN INSTRUMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 105, 106, para. 195; and FOR CASES, see DIGEST, Vol. 37, pp. 70, 71, Nos. 114, 115.]

Cases referred to :

(1) *Pownall* v. *Graham* (1863), 33 Beav. 242 ; 37 Digest 63, *65*.
(2) *Re Roby, Howlett* v. *Newington*, [1908] 1 Ch. 71 ; 23 Digest 469, *5381* ; 77 L.J.Ch. 169 ; 97 L.T. 773.
(3) *Re Leeke's Settlement Trusts, Borough* v. *Leeke*, [1937] Ch. 600 ; [1937] 2 All E.R. 563 ; Digest Supp. ; 106 L.J.Ch. 228 ; 157 L.T. 481.
(4) *Powys* v. *Mansfield* (1837), 3 My. & Cr. 359 ; 44 Digest 379, *2133* ; 7 L.J.Ch. 9.
(5) *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482 ; 20 Digest 453, *1770* ; 60 L.J.Ch. 403 ; 64 L.T. 429.
(6) *Pym* v. *Lockyer* (1841), 5 My. & Cr. 29 ; 20 Digest 453, *1769* ; 10 L.J.Ch. 153.
(7) *Meinertzagen* v. *Walters* (1872), 7 Ch. App. 670 ; 20 Digest 455, *1785* ; 41 L.J.Ch. 801 ; 27 L.T. 326.
(8) *Stewart* v. *Stewart* (1880), 15 Ch.D. 539 ; 44 Digest 1239, *10702* ; 49 L.J.Ch. 763 ; 43 L.T. 370.
(9) *Re Heather, Pumfrey* v. *Fryer*, [1906] 2 Ch. 230 ; 20 Digest 455, *1786* ; 75 L.J.Ch. 568 ; 95 L.T. 352.
(10) *Re Moore, Prior* v. *Moore*, [1901] 1 Ch. 936 ; 37 Digest 63, *66* ; 70 L.J.Ch. 358 ; 84 L.T. 501.
(11) *Ex p. Pye, Ex p. Dubost* (1811), 18 Ves. 140 ; 20 Digest 463, *1886*.
(12) *Re Pollock, Pollock* v. *Worrall* (1885), 28 Ch.D. 552 ; 20 Digest 469, *1947* ; 54 L.J.Ch. 489 ; 52 L.T. 718.

Adjourned Summons. The testator, Ernest Vaux, died on Nov. 25, 1925. He had two sons and two daughters, all of whom survived him. His wife also survived him and has not re-married. Subject to the provision made for his wife, the trustees were directed by the will to set aside £20,000 for each of the testator's daughters. Between the date of his will and his death, namely, on Dec. 9, 1924, the testator made a settlement of 8,000 6 per cent. preference shares of £5 each in C. Vaux & Sons, Ltd., a private company, upon his four children in equal shares, so that each daughter had settled upon her and her children 2,000 of such shares. The eldest son, Ernest Vaux, died on Dec. 26, 1936, aged 26, a bachelor and intestate, and no grant of administration of his estate has been taken out. The questions arising for determination on this summons were, *inter alia* : (i) whether the provision made for the daughters was a " portion " so as to make the rule against double portions applicable, if it was otherwise applicable, to (*a*) the legacy of £20,000 made by the will, and (*b*) the provision made *inter vivos* ; (ii) if the terms of cll. 11 and 12 of the will infringed the rule against perpetuities ; and, that point having been decided in the affirmative, (iii) whether the rule against double portions, whereby the legacies were adeemed, applied to the partial intestacy thus created, and, if so, was it for the benefit of the children only.

H. O. Danckwerts for the plaintiff.

Norman Daynes, K.C., and *E. M. Winterbotham* for the first defendant, the widow of the testator.

C. E. Harman, K.C., and *J. Leonard Stone* for the second and third defendants, the two daughters.

H. A. H. Christie, K.C., and *J. G. Strangman* for the last defendant, Peter Vaux.

The case was before the court on several occasions. The following arguments were addressed to the court on the question arising under the rule against perpetuities.

A *Daynes, K.C.:* The net result of paras. 11-14 of the will is that there is an intestacy, because the dispositions in those clauses are bad for perpetuity. It is necessary to be careful about directions if one wishes to avoid limitations as to remoteness. It is clear from cl. 9 that the testator knew the difference between children and remoter issue, because he there B speaks of children and remoter issue.

Winterbotham: "My trustees" must mean the trustees from time to time. That being so, cl. 11, standing alone, must be void for perpetuity. It cannot be limited by the class of objects which takes under it. Clause 12 may be regarded as intended to limit cl. 11 by adding that C the language must be kept within the law against perpetuities. It may be that it is a power which overrides the trust. Clause 12 may be a provision which overrides cl. 11. Whichever it is, the gift cannot be saved from being void. It cannot be made a good gift by the insertion of such words as "save that the trust must be kept within the limitation." D That power is equally invalid. None of the grandchildren was alive at the date of the death of the testator. It is necessary to determine within what period the trustees must act, and it is not enough to say that it must be within the period allowed by the rule against perpetuities. [Counsel referred to *Re Moore, Prior* v. *Moore* (10).]

E *Christie, K.C.:* The true view is that cl. 12 qualifies cl. 11, and, if that is right, there is a limitation within which the trustees must exercise their powers, and that is a perfectly valid limitation. [Counsel referred to *Pownall* v. *Graham* (1).]

The following arguments were addressed to the court on the question F arising on the rule against double portions.

Harman, K.C.: The rule does not apply to partial intestacy at all. The only point that the court has to decide is as to whether or not the rule applies to a partial intestacy. Both the widow and the son take under the intestacy, and not under the will. In the present case, one G cannot tell in what proportion the testator intended the children to benefit, and therefore the rule cannot apply. The rule is a rule of conduct in the efforts of the court to fulfil the intentions of the testator. When people take against the will, there is no reason for the rule. No one taking under an intestacy has a right to say that the benefit given H under the will must be cut down for his benefit. [Counsel referred to *Re Heather, Pumfrey* v. *Fryer* (9) and *Re Roby, Howlett* v. *Newington* (2).]

Daynes, K.C.: This is not a case of anyone saying: Here is a special equity. In cases where a portion is given, the court attributes to the testator a presumption unless it is displaced. Anyone who can benefit by that presumption is entitled to assert it and to rely upon it, subject to the court saying that it is to apply only in so far as it does not benefit persons who are strangers to the testator. There is no authority which exactly covers this point. Possibly there would be authority if the early cases had set out what happened to the residue. If, in this case, the testator had said that the residue was to be distributed amongst his next of kin, I suppose that it would not be disputed that the doctrine of double portions would apply. It is said, however, that, because the testator has left the law to take its course, the court has to say that the people who are the next of kin are not to benefit. The rule is one which ought to be applied, unless the court comes to the conclusion that there is something in the circumstances to rebut the presumption. The Administration of Estates Act, 1925, does not operate against my client, but helps her. [Counsel referred to *Ex parte Pye*, *Ex parte Dubost* (11).]

Winterbotham : The principle of the ademption of legacies is that the court assumes that, if a testator has given a legacy to a child, it is for the purpose of providing for the child. If, in his lifetime, the testator has given a sum for the same purpose, the law presumes that he did not intend to duplicate his gift. There is a gift, which the court takes to be a portion, in the will, and there is a gift, which the court takes to be a portion, outside the will. The court does not consider where the residue goes, and, throughout all the cases, what happened to the residue has never been considered. [Counsel referred to *Re Pollock, Pollock* v. *Worrall* (12), *Meinertzagen* v. *Walters* (7), *Re Heather, Pumfrey* v. *Fryer* (9), *Pym* v. *Lockyer* (6).]

SIMONDS, J. : A number of questions arises upon the will, dated Nov. 27, 1919, of Ernest Vaux, who died on Nov. 25, 1925. I propose now to deal with only one of those questions—that is, whether or not there has been, by reason of a settlement to which I will refer, an ademption in part of the legacies given to the testator's daughters by his will. The will, so far as is material to be stated for the purposes of the present case, is as follows. The testator made a residuary bequest and devise in the ordinary form, and directed his trustees to pay the income of his residuary trust fund that he thereby constituted to his wife during her life or widowhood, and, in the event of her marrying again, he gave to her an annuity of £500 a year. He directed that, from and after the decease or re-marriage of his wife, and subject in the latter event to the annuity of £500 per annum, his trustees should stand possessed of his residuary trust fund upon trust to set aside and appropriate for each of his daughters who might be living at the time of his decease, or born in due time afterwards, investments of the value, at the time of such appropriation, of £20,000. By his will he settled those legacies of £20,000 upon his daughters. I need not state the terms of the settlement, which were substantially in the ordinary form. He further directed that, subject to the provision of those legacies, his trustees should stand possessed of his residuary trust fund upon trust to pay and apply both

the income and capital thereof in such shares and portions as they might in their absolute and uncontrolled discretion think fit to or for the benefit of all or any one or more of his children, or the issue of any deceased child. The question arises in regard to that and the succeeding clauses of the will as to whether, in fact, the testator has violated the
A rule against perpetuity so that his residuary bequest is void. That I have reserved for further consideration. Having made the residuary bequest in those terms, he then goes on to say, and it is material in considering the present question also to refer to it:

> Having the fullest confidence in my trustees I hereby authorise and empower
> B them to deal with the capital and income of my residuary trust fund and pay away and deal with the same in all respects for the benefit and provision of my children or grandchildren as they may think best or most expedient and to act in all respects as I could have done if living save only that all such dealings with the residuary trust fund and the income and accumulations thereof shall be within the limitations prescribed by law.

C Then he goes on, and this is material as indicating in some degree what his intention was:

> Without imposing any legal obligation on my trustees it is my wish and desire that subject to the provisions hereinbefore made for my wife and the sum of £20,000 hereinbefore bequeathed for the benefit of each of my daughters the whole of the residue of my real and personal estate shall be divided amongst my sons in
> D equal shares but that no capital moneys shall be paid to any son until he attains the age of 30 years.

He then goes on to provide in this way:

> It is also my wish and desire without imposing any legal obligation on my trustees that in the event of the death of any son of mine the share which in accordance with my wishes above expressed would have gone to him if living shall be paid to his
> E children or their issue if any and if there shall be no such children or issue shall be divided equally between such of my children as may survive him but the share so paid to any daughter shall be subject to the provisions hereinbefore contained as to the sums of £20,000.

That being his will, the testator, as I have said, died on Nov. 25, 1925, but in the meantime he had made a settlement. On Dec. 9, 1924—
F that is to say, a little less than a year before his death—he made a settlement of 8,000 6 per cent. preference shares of £5 each in a company called C. Vaux & Sons, Ltd., a private company. That settlement was in a simple form, a settlement of the 8,000 preference shares I have mentioned upon his four children. He had four children, and no more.
G The settlement was upon those four children in equal shares, but the shares were settled with cross-remainders between the children in certain events, so that, in effect, each daughter—and this is what is material for the present purpose—had 2,000 6 per cent. preference shares of this company settled upon her. The question which now arises for my
H decision is whether, in accordance with the rule against double portions, each of the two shares so settled in the case of each daughter is to be treated as *pro tanto* an ademption of the £20,000 legacy settled upon her by the will. The rule against double portions has been stated too often to need re-statement by me. It is a rule which is not likely to be repelled by differing circumstances in the legacy or by the gift *inter*

vivos respectively, and it has not been argued before me that the differences which exist between the legacies in the case of the will and the limitations in the case of the settlement ought to displace the rule, but it has been suggested for two reasons that the rule should not here apply. The first is because of the difference in the subject-matter of the gift, the one being a legacy *simpliciter*, the other being a gift of shares in a private company, and it is said that it is not to be presumed that this testator, in making a settlement of the shares in a private company, intended to affect the bequest which he had made in favour of a daughter by his will. For my part, I see no sort of validity in that contention. It appears to me clear that, just as the settlement of a sum of money must adeem *pro tanto* a pecuniary legacy, so also a settlement of a sum of stock must *pro tanto* adeem a pecuniary legacy. It does not appear to me to be of any real importance whether the value of that sum of stock can be ascertained by reference to daily dealings on the market, or whether it is to be ascertained by some form of inquiry which the court can, if necessary, direct. The value of the stock can be ascertained. The gift of stock, in other words, can be quantified in terms of money, so that there is no reason why the rule should not apply, and a gift of stock be treated as *pro tanto* an ademption of a pecuniary legacy. No case has been cited to me in favour of, or against, the view that a sum of stock in a private company may be taken as an ademption or satisfaction of a pecuniary legacy. I see no difficulty in determining that, just as a gift of stock in a public company has been held to operate under the rule, so also may a gift of stock in a private company. I have used sometimes the word "stock" and sometimes the word "shares," but that makes no difference. Next it is said that, upon the scheme of this will, I can find a sufficient indication that the settlement ought not to operate *pro tanto* in satisfaction. It may be that there are cases where, looking at the will as a whole, and at the gift which is made subsequent to the will, one may find indications that the testator did not intend that the gift should operate *pro tanto* in satisfaction of the legacy. There is, of course, no limit to the variety of circumstances which have to be considered in such cases; but here I find, looking at the scheme of the will as a whole, that it was not alien to the testator's intentions that the daughters should get a £20,000 legacy and no more, and that the whole of the residue should be divided between his two sons. If that be so, how can I say that a settlement upon his children equally (for that is what was effected on Dec. 8, 1924) indicated that he intended that the rule against double portions should not apply in the case of his daughters, for what he did is equally referable to this intention, that he did intend, so far as his daughters were concerned, that the settlement upon them should be *pro tanto* in satisfaction of their legacy, and that the settlement upon his sons should be *pro tanto* an advancement of that part of the residue which he otherwise intended them to take. It is impossible to find, in the circumstances of this case, any adequate reason why the rule against double portions should be displaced. Accordingly, I shall determine in this case that the rule against double portions applies, so that, in the case of the two daughters, their legacies under the will are *pro tanto* adeemed by their share in the settled fund, the value of which is to be ascertained as at the date of the settlement. For that purpose, there must, if necessary, be an inquiry as to what was the value of 2,000 6 per cent. preference shares of £5 each in this company as at Dec. 9, 1924.

Feb. 23. By his will the testator appointed his brother Cuthbert Vaux, Frank Nicholson, and his wife, Emily Eve Lellam Vaux, to be the executors and trustees of his will, and he declared :

> In the interpretation of this my will the expression "my trustees" shall where the context permits mean and include the trustees or trustee for the time being hereof whether original or substituted.

The ultimate residuary gift was in these terms :

> And as to the rest residue and remainder of my residuary trust fund I declare that my trustees shall hold the same upon trust to pay and apply both the income and capital thereof in such shares and proportions as they may in their absolute and uncontrolled discretion think fit to or for the benefit of all or any one or more of my children or the issue of any deceased child of mine and I declare that my trustees may from time to time within the period of 21 years from my decease accumulate the surplus of any income of my residuary trust fund not paid or applied under the preceding clause of this my will by investing the same and the resulting income thereof to the intent that the accumulations shall be added to the residuary trust fund and follow the destination thereof with liberty nevertheless for the trustees at any time or times to resort to the accumulations of any preceding year or years and apply the same as part of my residuary trust fund.

That clause, standing alone, is clearly void for perpetuity. The contrary was not contended by those whose interest it would have been to do so. Clause 11 is followed by cl. 12, which is in these terms :

> Having the fullest confidence in my trustees I hereby authorise and empower them to deal with the capital and income of my residuary trust fund and pay away and deal with the same in all respects for the benefit and provision of my children or grandchildren as they may think best or most expedient and to act in all respects as I could have done if living save only that all such dealings with the residuary trust fund and the income and accumulations thereof shall be within the limitations prescribed by law.

Then by cll. 13 and 14 the testator expresses certain wishes as to the way in which his trustees should advance the trusts and exercise the powers vested in them. These two clauses, in my judgment, are no more than what the testator declares them to be—namely, expressions of his wish and desire, which do not impose any obligations on them. They do not assist me in determining the meaning and effect of the previous clauses.

The questions that I have to decide are (i) what, in its context, is the meaning of cl. 12, and, in particular, does it limit and control the trusts declared by the preceding cl. 11, and (ii) if so, is cl. 12 itself a valid disposition, or does it infringe the rule against perpetuity, or is it otherwise void for uncertainty ?

The first question is purely one of construction of the language of this will, which will, I hope, not be repeated in any other will, and it appears to me reasonably clear that I should not be justified in giving to cl. 12 any such limiting or controlling effect as is suggested. The authority and power given by the testator to his trustees by cl. 12 are clearly intended to be something different from that provided by cl. 11; for, if not, there is no object in putting it in. In form, and in language, it is a particular authority falling within the larger ambit of the trust created by cl. 11. If so, it can neither limit nor control that trust so as to bring it within the perpetuity limits, nor can it stand by itself as an independent and effective disposition. In this view, it is unnecessary to decide what might be the effect of the provision contained in cl. 12:

> all such dealings with the residuary trust fund and the income and accumulations thereof shall be within the limitations prescribed by law.

I think, however, that there is much force in the contentions put forward by those who argue against the validity of the clause, first, that, since the power is vested in the trustees for the time being of the will, it is void if it is capable of being exercised beyond the lives in being at the testator's death and 21 years thereafter; and, secondly, that the words "within the limitations prescribed by law," though aimed at defining the period, do not do so with sufficient precision, with the result that, even if the power is exerciseable within proper limits, yet it is impossible to say what those limits are, and therefore the gift must fail for uncertainty. I was much impressed with the case of *Pownall* v. *Graham* (1), where Sir John Romilly, M.R., had to consider what was the effect in their context of the words "as the law in such cases admits," and found it possible to determine that they had reference to the life of the last surviving brother of the testator and 21 years thereafter, thereby giving validity to the gift therein concerned. If, as a matter of construction, I could say with reasonable certainty to what period the testator was pointing in this will, I should follow the same course, but it appears to me that it would be the merest guesswork. The testator might have had in mind the children, or the grandchildren, or the remoter issue living at his death, or he might have had in mind one of the devices to one of which only it is enough to refer in this connection, of limiting the period by reference to the lives of the descendants of Queen Victoria. After many readings of the will, I am quite in the dark as to what period is indicated, and, accordingly, I should, in any case, hold the gift void for uncertainty.

Mar. 16. The testator died on Nov. 25, 1925. He had two sons and two daughters, all of whom survived him. His wife also survived him, and has not re-married. Between the date of his will and his death—namely, on Dec. 9, 1924—he made a settlement of 8,000 6 per cent. preference shares of £5 each in C. Vaux & Sons, Ltd., upon his four children in equal shares, so that each daughter had settled upon her and her children 2,000 of such shares.

No question has been raised in these proceedings as to the provision thus made for the sons, but as to the daughters the question has been raised whether the provision so made for them was a "portion" so as to make the rule against double portions applicable, if it was otherwise applicable, to (*a*) the legacy of £20,000 bequeathed by the will, and (*b*) the provision thus made *inter vivos*. This question I have already decided in the affirmative, holding that the settlement of shares in this A company is equivalent to the provision of a sum of money of the value of such shares. It is now necessary to consider more closely whether, and, if so, how far, the rule applies in this case, and I need only add to the statement of facts I have already made this further result of my decision on the construction and effect of the residuary bequest—namely, B that the executors must hold the ultimate residue of the trust fund upon trust for the persons entitled under the Statute of Distributions in the shares in which they are entitled thereunder.

It has been argued before me, on the one hand, that the rule is not to be applied where there has been, as here, a partial intestacy, or, at any C rate, that it ought not to be applied for the benefit of the widow of the testator, and, on the other hand, that it is to be applied, and, moreover, if applied, must be applied for the benefit of all persons who take a share of the undisposed-of residue, whether widow or child.

In the course of the argument, I was referred to a number of authorities, D and I have since looked at a larger number. In the result, I am satisfied that there is nothing which precludes me from deciding, and that I ought upon principle to decide, (i) that the rule must here be applied, and (ii) that it can, and must, be so applied as to benefit children only, and not the widow, who, for this purpose, is to be regarded as a stranger to E the testator.

The contention that to such a case as this—that is, a case of partial intestacy, where by a fiction the executors hold the undisposed-of residue upon trust for the persons entitled under the statute—the rule against double portions can have no application was largely founded on F the analogy of the Statute of Distributions itself. It being the law until the coming into force of the Administration of Estates Act, 1925, that, in the case of partial intestacy, advances made by the testator in his lifetime need not be brought into hotchpot (see *Re Roby, Howlett* v. *Newington* (2)), why, it was urged, should the rule against double G portions be applied in a similar case ? It appears to me that the answer to this contention is to be found in the history of the rule against double portions as applied to cases of ademption of legacies. The rule against double portions has several aspects. With one of them I had recent occasion to deal in *Re Leeke's Settlement Trusts, Borough* v. *Leeke* (3). H In its application to cases of ademption, which is perhaps the most frequent sort of application, the principle is clear. It is supposedly the duty of a father to make provision for his child. If, having performed that duty by his will, he subsequently makes provision for his child *inter vivos*, he is presumed to have done in whole or in part that which he intended by his will to do, and is presumed to have intended that his will should not operate in part or in whole in regard to the provision thereby made. Just as when a testator by his will gives his horse, Brown Bess, to A.B., and then gives it to him in his lifetime, the legacy is adeemed, or when he by his will gives to A.B. the sum of £100 for a particular purpose and then gives him the same sum in his lifetime for the same purpose, the legacy is adeemed, so, by an artificial rule, if a testator by his will gives a portion to a child and then gives a portion to that child in his lifetime, the will portion is in whole or in part adeemed, because he is presumed in each case to be making the gift in discharge of the same natural obligation. This being the rule of ademption, it cannot, in my judgment, be material whether the testator makes any valid disposition of his residuary estate, or what disposition he makes, for the legacy is adeemed once and for all. It will not be revived even by a subsequent codicil re-publishing the will: *Powys* v. *Mansfield* (4). I must come to the conclusion, therefore, that the rule against double portions is applicable to a case of partial intestacy.

Next comes the question as to how it is to be applied where the persons entitled to the undisposed-of residue are (*a*) children, and (*b*) the widow of the testator. Upon this part of the case, I am conscious that my decision runs counter to *dicta* of very eminent judges. It appears to me, however, that I am justified both upon principle and by direct authority. In stating the rule against double portions in its application to ademption of legacies, it has been sufficient to refer to only one aspect of it—namely, the purpose or obligation of the parent to make provision for a child. There is, however, another aspect of it which is equally important in considering when and how far it is to be applied, because the equitable doctrine of double portions, whether in regard to ademption or in its other aspects, is founded, not only upon the duty of a father to provide for his children, but also upon his presumed intention to provide equally for them unless he plainly expresses himself to the contrary. Thus, in *Re Lacon, Lacon* v. *Lacon* (5), Bowen, L.J., after citing the well-known judgment of Lord Cottenham, L.C., in *Pym* v. *Lockyer* (6), at p. 46, and examining the presumption upon which the doctrine rests, thus finally describes it, at p. 497:

> a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend.

Though in few cases is this aspect of the case emphasised, yet in no case have I been able to find the rule applied, except where there were advanced persons other than the child to whom the testator stood in the natural relation of father, or *in loco parentis*.

If, then, the very foundations of the rule and the conditions of its application are that there are two or more persons in regard to whom the testator is presumed to intend equality of treatment, it would surely be strange if the rule was in fact so applied for the benefit of persons in regard to whom no such intention could be ascribed to the testator.

It is curious that the first decided case in which this view, which I should venture to think is clear enough, from a consideration of the doctrine, was definitely stated was not until 1872, when *Meinertzagen* v. *Walters* (7) was decided by JAMES and MELLISH, L.JJ. In that case, a testator directed his trustees to pay the income of one moiety of his resid- A uary estate to his widow during her life, and to divide the other moiety equally among his children. After his will, he made advances which were deemed to be portions to some of his children. Such advances accordingly had to be brought into account for the benefit of the children, among themselves, but it was decided that the widow was not entitled B to have her income increased by having the advances brought into account in estimating the residue. The contrary contention was described by JAMES, L.J., as so shocking to his common sense and to his sense of justice that he was glad to find that there was no foundation in the authorities for holding that the law of England was subject to C that opprobrium to which, if the law were as alleged, it would be justly subject in the eyes of the civilised world. The case before the court was, however, as I have already stated, one in which the contest arose in regard to residue only, and JAMES, L.J., in the course of his judgment, uses this language, upon which so much reliance has been placed in D the present case, at p. 673:

> No doubt that [the doctrine] has been necessarily applied to the advantage of residuary legatees, because, where the legacy fails, or is satisfied, or is adeemed, from the very nature of the case the residuary legatee who takes his chance gets the benefit of that, as he would the burden of any diminution. That is the state of the law with regard to legacies.

E So also MELLISH, L.J., said, at p. 674:

> Now, in the ordinary case of a legacy, where a legacy has been left to a child, and then a gift has been made which amounts to an ademption of that legacy, there certainly appears to be no possible way of holding it to be an ademption so as to carry out the general rule against double portions, except by holding that whoever has the residue benefits by it; because by the necessity of the case the persons who F have the residue must benefit by the fact of the previous legacy not being paid from any cause whatever.

It is with the greatest diffidence that I, in the face of those statements, decide that, where the rule has to be applied upon the ademption of a legacy, it neither need, nor ought to, be applied for the benefit of a G residuary legatee who is a stranger to the testator.

In the first place, the principle must be the same in both cases. It is equally shocking to common sense and the sense of justice that a stranger should benefit by the application of the rule, whether upon the ademption of a legacy or upon a simple division of residue. In the second place, H the authorities cited to the court in that case do not justify the proposition that "that is the state of the law with regard to legacies," if it is meant that they decide that a stranger residuary legatee may benefit by an application of the rule, because in none of them, it appears to me, was there a stranger residuary legatee. With respect, I doubt whether the proposition could be put higher than that it was assumed to be the

law, though there had never been an express decision. In the third
place, I fail to see the necessity which appears to have weighed with
both the Lords Justices. There is surely no necessity arising from the
nature of the case for all the residuary legatees alike to benefit upon
the ademption of a legacy. Let me take a simple example. A testator
has two sons, A. and B., and a nephew C. to whom he does not stand A
in loco parentis. He makes a will by which he gives a legacy of £3,000
to son A. and his residue equally among A., B. and C. He then gives
£3,000 to A. in his lifetime, and I will assume that both legacy and gift
inter vivos were portions so as to bring the rule into play. He dies,
leaving a clear sum of £15,000 available for distribution. For the benefit B
of C., the rule is not applied. He therefore gets one-third of the residue
of £12,000, or £4,000. As between A. and B., however, it is applied for
the benefit of the latter, and, accordingly, of the remaining £11,000,
A. gets £5,500 and B. gets £5,500. The testator is presumed to have
intended equality between his children, except in so far as he has made C
express provision to the contrary. In the example given, his intention
is presumed to have been that A. should get, in all, £3,000 more than
B., and that intention has been carried out. Calculations of some
difficulty may, in some cases, have to be made, but I see no reason why
the principle should not in all cases be applied, just as it must be applied D
in cases such as *Meinertzagen* v. *Walters* (7), where the question arises
only in respect of a residuary gift, or in analogous cases such as *Stewart*
v. *Stewart* (8), where the question arises from a hotchpot direction, and
a partial intestacy. The observations of the Lords Justices to which
I have referred were not necessary to the decision of the case, and I am E
the less reluctant to differ from them when I recall how the doctrine of
the rule against double portions has developed in this court. Lord
Hardwicke, L.C., held, and it was for many decades the law, that a
portion by will would be wholly adeemed by a lesser portion *inter vivos*.
That ceased to be the law. It was for long thought that the rule against F
double portions could have no application to a share of residue, until,
in 1859, the contrary was laid down. It was only in *Meinertzagen* v.
Walters (7), in 1872, that the court clearly laid down that the rule was
not, in the case of a division of residue, to be applied for the benefit
of a stranger. It appears to me that in this process of development the G
next logical step is to determine that, in the case also of ademption of
a legacy, the rule is not to be used to benefit a stranger.

Finally, in support of this view, I must refer to the decision of
Swinfen Eady, J., in *Re Heather*, *Pumfrey* v. *Fryer* (9). In that case, a
testator bequeathed a legacy of £3,000 to an adopted child to whom H
he stood *in loco parentis*, and divided his residue equally between that
child and a stranger. He made a subsequent advance of £1,000 to that
child. The judge held that the advance was not a portion, so that the
question of double portions did not arise at all, but he went on to say
that, even if it were, a rule designed to produce equality among children

ought not to be extended so as to reduce their shares for the benefit of a stranger. He said, at p. **234** :

> No authority compels me to do so, and I should certainly have declined to extend the rule in this way if the £1,000 had been a portion.

It has been urged that the observations of SWINFEN EADY, J., were
A *dicta* only, since, upon his own finding, the question did not arise, and, further, that, though he cited and relied on *Meinertzagen* v. *Walters* (7), he did not refer to the material passages which I have quoted. That is so, but what SWINFEN EADY, J., would have done if it had been necessary, I have little hesitation in doing where the necessity arises. There
B will, accordingly, be a declaration that, for the purpose of ascertaining the ultimate residue of the testator's estate, and the shares therein of his children, but not for the purpose of ascertaining the ultimate residue of the estate, and the share therein of his widow, the daughters' legacies are to be treated as adeemed to the extent of the value, on Dec. 9, 1924,
C of the shares settled on them respectively.

Solicitors : *Patersons, Snow & Co.*, agents for *Ranson & Co.*, Sunderland (for all parties).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

D

COMPANIA NAVIERA BACHI *v.* HENRY HOSEGOOD & CO., LTD.

[KING'S BENCH DIVISION (Porter, J.), **March 7, 8, 14, 1938.**]

E *Shipping—Vessel requisitioned by Spanish Republican Government—Refusal of crew to discharge vessel—Whether such conduct barratrous.*

A Spanish ship, the property of a company domiciled at Bilbao, was carrying maize from South America to Sharpness at the time when Bilbao was captured by General Franco. The Spanish Republican Government purported to requisition all Spanish ships, either in port or on the high seas. Upon the ship's arrival at Sharpness, notice of the
F requisitioning was given to the captain. The crew threatened to stop the discharging of the vessel unless all their wages were paid over to them in sterling, and, owing to their attitude, work on the discharging ceased. The defendants, who were the receivers under the bill of lading, obtained an injunction against the captain, to prevent him from not discharging the cargo. The plaintiffs, the owners of the ship, brought an action for
G the balance of the freight, and the defendants claimed as a set-off the amount they had had to pay as additional cost of discharging, and the costs of obtaining the injunction. It was found as a fact that the custom in the case of Spanish ships was to pay the wages in Spain at the end of a round trip. The charterparty contained a clause exempting the ship from liability for any loss due to barratry :—

HELD : (i) although there was no crime committed, and no intention
H of injuring the owners, the loss in this case was due to the barratry of the crew, as there was an act done which in fact prejudiced the owners.

(ii) the loss was not due to a strike or stoppage of labour, as there had been no withholding of labour by the workmen engaged in discharging the cargo.

(iii) the owners had acted reasonably (*a*) in their method of paying the crew and (*b*) in not having taken steps to arrest the crew or to obtain an injunction against them.

(iv) the expenses of the defendants in obtaining an injunction against the captain were incurred reasonably, and were a loss due to the barratry.

[**EDITORIAL NOTE.** The essential feature of barratry is that it shall prejudice the shipowner. Generally speaking, the acts of the master or crew which amount to barratry are also criminal; but this is not essential.

As to Barratry, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 112, 113, para. 192; and for Cases, see DIGEST, Vol. 41, pp. 419, 420, Nos. 2621-2635.] A

Cases referred to:

(1) *Mentz, Decker & Co.* v. *Maritime Insurance Co.*, [1910] 1 K.B. 132; 29 Digest 151, *1052*; 79 L.J.K.B. 104; 101 L.T. 808; 15 Com. Cas. 17.

(2) *Field* v. *Metropolitan Police Receiver*, [1907] 2 K.B. 853; 15 Digest 646, *6887*; 76 L.J.K.B. 1015; 97 L.T. 639. B

A. J. Hodgson for the plaintiffs.

K. S. Carpmael, K.C., and *Hon. H. L. Parker* for the defendants.

Porter, J.: This is a claim by a Spanish company, domiciled, I understand, at Bilbao, against Henry Hosegood & Son, Ltd. The C plaintiffs I may refer to as the ship, because in fact they are carriers of grain for the purposes of this action, and Henry Hosegood & Son, Ltd., I shall refer to as the receivers, because they are the persons receiving under the bill of lading, and bound by the bill of lading in respect of that grain. The ship was a Spanish ship, and was, on the voyage in respect D of which the claim arises, carrying maize from South America to Sharpness, in this country. While she was on that voyage, Bilbao fell to General Franco's forces, and thereupon the republican government in Spain determined to requisition any ships which they could which were either in a port or on the high seas. The vessel arrived at Sharpness on Aug. 22, E 1937. By Aug. 18, the republican government of Spain had already indicated their intention to requisition the ship, and an intimation to that effect was given by the ship's agents in Cardiff. On Aug. 23, after her arrival, notice of requisition was given to the captain by a body which appears to have been acting on behalf of the Spanish government. On F the day of her arrival, or the day after, Senor Sasieta came on board. He had an interview with the captain, and indicated that he was the person representing the Spanish government, whose orders must be obeyed. Thereupon the crew and the officers, if one may so describe it, took sides in the dispute between the shipowners and the body requisitioning G the ship, the captain, the chief engineer, the second engineer, and a steward determining to follow the fortunes of the owners, and the rest of the crew—some 27, I think, in number—determining to stand by the republican government. On Aug. 24, the ship was berthed, and the Spanish Consul demanded the ship's papers in order that he might take H note of them. Prior to her discharge on Aug. 23, the captain borrowed £200 from his agents, and paid the crew £2 10*s.* per month as part of their wages and allowances, that sum being paid at an exchange of 36·5 pesetas to the £. That is to say, the men's wages being payable in pesetas, they received the equivalent sterling value at 36·5 pesetas to the £.

There was some trouble with the men, who were not inclined, now that the ship had been taken over, to obey the orders of the captain, but the ship was berthed and discharge began on Aug. 27, 1937. On that day the crew indicated to the captain that they did not propose to allow the discharge unless they were paid the rest of their wages, stipulating the sum at the rate of exchange of 45 pesetas to the £. The letter, which is addressed by a gentleman who calls himself the delegate, who I am told was in fact the third engineer, is as follows:

> 110,000 pesetas is the approximate amount due to us in respect of wages. We bring to your notice that if within 24 hours from this moment we do not receive settlement of our wages in English currency at the rate of exchange of 45 per £1 we shall find ourselves compelled to stop the discharging operations. We bring this to your notice for you to act accordingly. On behalf of the crew of the Juan De Astigarraga.

It is then signed on behalf of the men by this gentleman, who was, as I understand, officially a delegate of the crew, and, indeed, was so appointed under a decree of the Spanish government. Notwithstanding the letter, the men were persuaded to allow discharge, though they said that, if payment were not made by the following Monday, they would flood the holds and make trouble generally. The method of discharging at Sharpness is that, when a ship is put alongside, the hatches are first removed by the crew, when a suction pipe is put into the hold, and the grain (in this case maize) sucked up through the pipe and discharged either ashore or into barges. Therefore, after the first taking off of the hatches, the crew have not any specific act to do in reference to the discharge, because, when the hatches are put on at night, the coverings are merely placed upon the hatches, and a tarpaulin placed over them, and they are so placed and removed again next day by the stevedores discharging the ship. The discharge proceeded until Monday, Aug. 30, when it lasted for about twenty minutes only. The crew asked the stevedores how to disconnect the suction pipe, and, on being told how it was done, immediately proceeded to disconnect the suction pipe, whereupon discharging ceased. The master at once made a protest against the failure of the crew to permit the discharging to be continued. Work then ceased for the time being, the men's attitude not permitting any further work to be done. Immediately the work ceased, protests were made by the receivers to the shipowners, and were declared by the shipowners to be unacceptable on the ground that the ship was protected against any claim by its charterparty and the bill of lading. The agents suggested that the obligation to overcome the difficulty in discharging was on the master, and that, by way of overcoming it, the master ought to prosecute the men for disobeying his lawful commands, and they so suggested to the master. That attitude was also taken up by the receivers. The ship's agents, speaking to the receivers over the telephone, told them that the men would not allow the discharge. The receivers' agents, hearing that the crew would not allow the discharge, thought that that meant the captain, and thereupon proceeded to take proceedings for an injunction against the captain to prevent him from not discharging the cargo. The original application was made on Sept. 4, and was against the master only. It was supported by an affidavit by Mr. Watson, setting out the method of receiving generally, and setting out the disconnection of the discharging pipes. Paras. 6 and 7 are as follow : A

> 6. I am further informed by the said Roberts [the ship's agent] and verily believe that the defendant and/or his servants and agents threaten that if the said suction pipes are reconnected by the plaintiffs' stevedores he and/or they will disconnect them forthwith and will not allow the remainder of the cargo to be discharged pending the settlement of some dispute between the defendant his servants and agents and the owners of the said steamer. 7. As a result the plaintiffs continue B to be unable to obtain their maize and the same is being and threatens to continue to be withheld from them. The plaintiffs are suffering and will continue to suffer irreparable damage in that, *inter alia*, maize is liable to deteriorate to a serious extent.

He ends up by saying there are possibilities of a breach of the peace. The injunction was granted, and it was served on the master. Then C the stevedores returned again on Sept. 7 to continue the discharge. The men, however, said that they intended to prevent the discharge, and in fact, when an attempt was made to move the hatches, they replaced the hatches, put the tarpaulins over them, and stood or sat upon the hatches, offering violence to one of the stevedores who showed an intention D to continue the discharge. The police were present on that occasion, but were unwilling to go on board the steamer, and were unwilling to exercise any authority over the crew unless an injunction was first obtained preventing the crew from interfering with the discharge. Meantime, negotiations had been going on between the master and the E crew with regard to payment of wages. The facts, as I find them, on the wages are these. It is the practice on Spanish ships to pay the wages to the men after a round voyage, when they return to Spain. As a rule no trouble arises from that method of paying wages, nor is it usual for the owners to make any special provision for the payment of F wages in a foreign port. It is quite true that, by a regulation passed by the republican government, and by the contract between the men and the shipowners, the men are entitled to receive their wages monthly. In fact, the failure to be so paid leads to no trouble. There is a further provision of the Spanish law by which the first £2 10*s*. per month is G payable to the crew at a fixed rate of exchange, in this case 36.5. Otherwise, by the contract between the crew and the shipowners, the rate of exchange of the day is to take effect.

The trouble in this case between the men and the ship was two-fold. In the first place, whereas normally the ship was going back to Spain, H and wages were going to be paid there, the shipowners were ceasing to be shipowners at Sharpness, and the republican government was taking over. Therefore, the men were to some extent anxious about their wages. Primarily, however, it was with regard to the rate of exchange. The men, seeing the possibility of getting some advantage from their owners, and that, when the republican government was taking over, the authority of the owners would not be so readily exercised, were determined also to try to get the best rate of exchange which in fact they could. The result was that the owners—as I find, reasonably—had not made any special provision for the payment of wages at Sharpness, and that it was natural to wait until the freight was collected in order to pay the men their wages. The men knew that, and were anxious to get what benefit they could from that fact, even to the extent of getting more wages in sterling than those to which in fact they were entitled. Both the shipowners' representative, Mr. Roberts, and the master thought that they could not prosecute the men successfully in an English court, because they thought—and I think that they rightly thought—that they had not the backing of the Spanish Consular authorities in England to support a claim to do so. The English police in fact took the same view, because they were unwilling to proceed on board unless they were backed by the authority of an English court with an injunction to prevent the men from interfering with the discharge. In those circumstances, all the time that the discharge had ceased, negotiations were going on among the men, the master, and the ship's agents, negotiations which involved a discussion as to the correct amount of wages and also as to the proper rate of exchange, and, until Sept. 9, the men were never willing to take the proper rate of exchange, and the actual amount due had not been definitely determined. Indeed, if one may consider the reasonableness of the owners with regard to that period, in my finding they did behave reasonably in continuing those negotiations, and at times offered more than the men ultimately found themselves compelled to accept.

In those circumstances, the receivers say: "You took for us cargo which you promised to deliver safely. You have not delivered it safely, with the result that we have been put to the expense of £59 5*s.* 7*d.* additional cost of discharging. We have also been put to the expense of £130 in getting an injunction in order to enable us to have the cargo discharged, an obligation which is yours, for which we should not have had to pay." The plaintiffs, on the other hand, say: "We are excused by the terms of our bill of lading, which incorporates the charterparty."

I need not trouble with the bill of lading for this purpose, but I need refer only to cll. 29 and 30 of the charterparty. Cl. 29 is as follows:

> The steamer shall not be liable for loss or damage occasioned . . . by barratry of the master or crew . . . by riots, strikes or stoppages of labour . . . even when occasioned by the negligence, default or error of judgment of the pilot, mariners or other servants of the shipowners or persons for whom they may be responsible . . . the owners shall not be liable for any delay in the commencement or prosecution of the voyage due to a general strike or lock-out of seamen or other persons necessary for the movement or navigation of the vessel.

I ought to have read this before:

> But nothing herein contained shall exempt the shipowners from liability for damage or loss to cargo occasioned by bad stowage, by improper or insufficient dunnage, by absence of efficient ventilation. . . .

Then, finally, cl. 30 provides:

> If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lock-out of any class of workmen essential to the loading of the cargo, or by reason of obstructions or stoppages beyond the control of the charterers on the railways, or in the docks, or other loading places, or if the cargo cannot be discharged by reason of riots, civil commotions, or of a strike or lock-out of any class of workmen essential to the discharge, the time for loading or discharging, as the case may be, shall not count during the continuance of such causes, provided that a strike or lock-out of the shippers' and/or receivers' men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before the strike or lock-out. In case of any delay by reason of the before-mentioned causes, no claim for damages or demurrage shall be made by the charterers, receivers of the cargo . . .

Those are said to be a protection to the ship. Substantially, the protection is barratry. There is a further clause specially added to the charterparty, which is the ordinary charterparty, in these terms:

> The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.

Taking those exceptions in order, the first exception which is claimed is that the shipowners are protected because the extra cost of discharging was due to the barratry of the crew. It is plain that barratry can be committed by the crew; indeed, there have been cases where four or even one of the crew who has obtained authority has been found to have committed barratry, and where it has been found that the owners are entitled to recover as for barratry. It is true that in this particular case "barratry" is used in a charterparty and not in an insurance policy, but the meaning is the same in both. The matter is discussed somewhat fully in Chalmers on Marine Insurance, and a digest of cases is given at p. 161. Perhaps the nearest case is that of *Mentz, Decker & Co.* v. *Maritime Insurance Co.* (1), where Hamilton, J. (as he then was), said, at p. 24:

> The authorities prior to the Act show that where a captain is engaged in doing that which as an ordinary man of common sense he must know to be a serious breach of his duties to the owners, and is engaged in doing that for his own benefit, then he is acting barratrously.

In my view, it was barratry on this occasion. I do not think that for the purpose of barratry the commission of a crime is necessary. It must be a wilful act deliberately done, and to the prejudice of the owners. It is not necessary that the persons doing it should desire to injure the owners if in fact there is an intention to do an act which will cause injury, even if the act be done to the benefit of persons who are guilty of barratry. If, then, there was barratry, was there a loss by barratry? As far as the injunction is concerned, the receivers' claim for the expenses incurred in obtaining the injunction is based upon the allegation that it was a quite reasonable action to prevent loss. I suppose, much in the same way as in a fire claim, damage by water is possible as a reasonable method of preventing the spread of the fire. The owners retort that the action, if reasonable, was taken by reason of the barratry of the crew, and that it is therefore a loss by barratry, A and that the extra expense of discharging may not have caused the cargo to be physically lost to them, but that the word "lost" in cl. 29 is used quite generally, and is not confined to physical loss. Clause 29 is an exception in favour of the ship, and not in favour of the receiver, and the loss or damage is used without qualification, whereas, where, at B a later stage in the clause, loss by bad stowage, and so forth, is spoken of, the words "loss of cargo" are in fact inserted. It is quite true that in cl. 30 delay is specifically dealt with, and it is said on behalf of the receivers that, if loss or damage by delay was intended to be included, the best way of ensuring that would have been by inserting the words. C I think, however, that the reason for inserting "delay" in cl. 30 is because provision has already been made for prevention of loading or discharging. It may be that the more usual causes of delay are dealt with in cl. 30, but I do not see that loss by such causes as barratry or quarantine need necessarily be purely physical, nor do I think that the wording of cll. 29 D and 30 naturally so limits the meaning of "loss" in cl. 29. It is said, however, that the owners cannot recover because they were themselves in fault (i) in not paying the crew at the proper time, and (ii) in not taking steps either to arrest the crew or to obtain an injunction. So far as the question of pay is concerned, I have already found what the E practice on Spanish ships is, and I do not find that the shipowners were in fault as to their method of paying the crew. Secondly, so far as non-arrest is concerned, both the master and Mr. Roberts thought that they could not act without the authority of the Spanish authorities. I do not think that they were unreasonable in so acting. In fact, I think F that they were reasonable in endeavouring to persuade the men, and in not taking steps to have them arrested. If they had tried to arrest one of them, they might have provoked immediate violence. Finally, as regards the injunction, I do not myself see why the owners should be compelled to incur an expense in order to overcome a matter which is not G for them to pay for, but for others. I think it would be equally proper to allege that the owners, by paying the men's demands, could have immediately obtained the completion of the discharge. I see no obligation on their part to do that, nor do I see any obligation on their part to spend money in obtaining a result against which they are protected by H the terms of their contract, and, as I further say, in my view, they acted not unreasonably in endeavouring to make terms with the men. It was admitted that the shipowners were not protected by the words "civil commotions." As far as the words "strike or stoppage of labour" are concerned, the crew were not discharging, nor required for the purpose of discharging. Neither strike nor stoppage of labour, in my view, caused the loss. It was rather an interference with those endeavouring to discharge by an outside body than a withholding of labour by the workmen engaged in the discharge themselves. I find no intention of violence, which is one of the necessary ingredients required by *Field* v. *Metropolitan Police Receiver* (2).

Finally, as far as the claim that the shipowner is protected by the orders either of a foreign government or of someone purporting to act on behalf of a foreign government is concerned, making every assumption in favour of the authority, or the purported authority, of Senor Sasieta, I can find no evidence that he in any way ever suggested to the crew, or indicated to the crew, that they should refuse to discharge. In those circumstances, I hold it to be a loss by barratry, and not to be a loss by the other matters relied upon. However, that holding is sufficient for the plaintiffs' purposes, the actual form of action being as follows: the plaintiffs sue for the rest of their freight, and the defendants reply that they are entitled to set off the amount which they spent in obtaining the injunction and the extra cost of discharge. Technically, I think that the answer of the defendants is a counterclaim, and not a set-off, but that is quite immaterial for any purposes of this action. However, so regarding it, I think that the owners are protected by the clauses in their charterparty as incorporated in the bill of lading. The receivers cannot recover. Therefore the owners are entitled to recover their freight, and the receivers are not entitled to recover the damages which they claim. In those circumstances, there must be judgment for the plaintiffs, with costs.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the plaintiff); *Thomas Cooper & Co.* (for the defendants.)

[*Reported by* W. J. Alderman, Esq, *Barrister-at-Law.*]

HOPGOOD *v.* WILLAN.

[Court of Appeal (Greer, Slesser and Clauson, L.JJ.), **March 3, 4, 1938.**]

Practice—Action against several defendants—Judgment against all defendants—Appeal by one defendant only—Whether notice of appeal should be served on all defendants.

The plaintiff in a running-down action had obtained judgment against three defendants. One defendant appealed, unsuccessfully. The question arose as to whether the remaining defendants, who had been served with notice of the appeal, and had been present thereat, ought to have been so served, and whether they were entitled to their costs:—

Held: the other defendants had properly been made parties to the appeal, as they might have been interested in the result, had it been different. They were therefore entitled to their costs.

[**EDITORIAL NOTE.** It has long been the practice that parties who are unnecessarily served are not entitled to their costs of appearance upon an appeal. Co-defendants in an action for negligence are, however, interested in the question of costs, and, under the new legislation—Law Reform (Married Women and Tortfeasors) Act, 1935—they are also interested in the question of contribution. It is clear, therefore, that there may be important questions arising out of the result of the appeal which will concern the co-defendants, and upon which they ought to be heard.

As to Parties to be Served with Notice of an Appeal, see HALSBURY, Hailsham Edn., Vol. 26, p. 118, para. 233; and for Cases, see DIGEST, Practice, pp. 772, 773, Nos. 3370-3379. See also YEARLY SUPREME COURT PRACTICE, A 1938, p. 1257.]

Appeal from a decision of Swift, J., dated June 23, 1937.

The case is only reported upon the point whether the co-defendants should be served with notice of appeal, and whether they are entitled B to their costs. This point was raised after the court had given judgment dismissing the appeal.

Cartwright Sharp, K.C., and *Armstrong-Jones* for the appellants, the Empire Banana Co.

J. Alun Pugh for the respondent, the plaintiff.

C *N. R. Fox-Andrews* and *R. Knight* for the first defendants, the administratrix and administrator of Robert Willan.

Humfrey Edmunds for the third defendants, Trafalgar Transport.

Knight: I appear for the personal representatives of the deceased man Willan, and, in my respectful submission, I am directly affected D by the appeal, and for that reason I am entitled to my costs. We were actually served with notice of appeal by the appellants themselves. We are one of the defendants, and we have, in our defence, put the blame on the present appellants. I think that the position would be this. If the appeal here had succeeded, I apprehend that counsel for E the respondents would then have been forced to pay the costs of the appeal, and I apprehend that he in his turn would have asked the court to grant a Bullock order against the co-defendants, which, of course, would have been the normal course which would have been followed by Swift, J., had the plaintiff failed against any of the defendants. I am F affected here by this appeal, as I should then be in the position to have a Bullock order made against me.

Slesser, L.J.: Do you take any point under the new statute?

Knight: There is a further point as to the question of contribution.

Slesser, L.J.: If the appellants had succeeded, then, so far as G contribution is concerned, they would have been out of the picture.

Knight: Yes, my Lord.

Clauson, L.J.: Is not your point that the appellants took it upon themselves to serve you with notice of appeal, and, since they have done that, you come here and say, why should they not pay your costs?

H *Knight:* Yes, my Lord, although I should say I think there is authority——

Clauson, L.J.: I always understood that the right procedure was that the appellant is quite justified in making the respondents appear at their own risk as to costs, and then it is open to him to say: "I thought it only right they should know about the appeal, but they have appeared quite unnecessarily." If they do not take that course, why should they not pay your costs ?

Knight : I think that I should say that there is authority to the effect that, if notice of appeal is served on a party, and the court holds that the notice of appeal was unnecessary, and the presence of the person appearing unnecessary, it may well be that the court would not grant the costs.

Slesser, L.J. : I think that the general form is : We are very pleased to see you, but we are not prepared to grant costs.

Greer, L.J. : You say that you are directly interested. There are two points in this : (i) that you resist the order, and (ii) that the direct damages ought to be distributed equally.

Slesser, L.J. : Under the new Act, there is a fund which has to be paid to the plaintiff, and it may be that the distribution under that contribution of joint tortfeasors would be different whether or not the appellant succeeds under this appeal. That seems to me to give you a greater interest than the Bullock order, because we have now held that application may be made as part of the same proceedings.

Greer, L.J. : I think now that, as all you defendants were served with notice of appeal, you should have your costs.

Cartwright Sharp, K.C. : It would be of the greatest service if your Lordships could assist with regard to a point of practice. There is a contribution between joint tortfeasors. Where one gets a case where only one defendant appeals against the judgment, is it or is it not the duty of the appealing defendant to give notice to the other defendants and to serve them ? If that is not done, the court will be asked to do something that may very materially affect the interests of parties who are not before them. Let us take this present case, only supposing that the result had been a result more fortunate than that of this appeal is from my point of view. On that assumption, what would be the position ? Supposing your Lordships thought : Here judgment ought to be entered for the Empire Banana Co. What could your Lordships do ? If your Lordships gave your judgment, your Lordships would then be affecting the rights of both of my co-defendants, quite apart from a mere question of costs, as to whether your Lordships would or would not see fit to make a Bullock order. Here is a sum of £1,500 odd. In the normal way, if nothing else were done, each of the three would contribute their one-third, and divide the plaintiff's costs between them. If your Lordships were then to upset the judgment as against my clients only, my learned friends are between them interested in a sum very much in excess of £500, and how your Lordships could in real justice make an order that means over £500 to them, without giving them any opportunity of being heard, presents, if I may humbly say so, some difficulties. So, if your Lordships could give an indication of whether it is not the duty of an appellant, in those circumstances, to serve notice upon his co-defendants, it would be a great advantage as a matter of general practice.

SLESSER, L.J.: It appears to be a question of whether or not it is necessary. I see that THE ANNUAL PRACTICE, 1938, under the heading " Appearance of party served unnecessarily," says, at p. 1296:

> Service of notice of appeal does not entitle the person served to his costs of appearing on the appeal, if such appearance is unnecessary.

Cartwright Sharp, K.C.: The question is, if your Lordships will say the appearance is unnecessary, then we know where we are for the future, but, if your Lordships say no, because the court would not be willing to affect materially the interests of people who are not before it, and therefore, in future, the co-defendants in a case like this ought to be served, then again we are aware of what is our duty in those future cases.

GREER, L.J.: The defendants other than the appellant in this case were properly made parties to this appeal, because they were interested in the result in the manner which has been indicated, either in resisting a Bullock order or in asking for such rights as they get under the new law for the distribution of liability. I do not propose to make any *ex cathedra* statement as to what would happen if the result of the appeal had been different from what it is. It being what it is, I think that the other defendants are entitled to their costs for their appearance.

Defendants, other than the appellants, entitled to their costs in the appeal.

Solicitors: *Stanley & Co.* (for the appellants); *Carpenters* (for the plaintiff); *W. Stanley Eastburn* (for the first defendants); *Barlow, Lyde & Gilbert* (for the third defendants).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

PHILADELPHIA NATIONAL BANK *v.* PRICE.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **March 21, 22, 23, 1938.**]

Insurance—Bank—Indemnity against loss due to advances on invalid documents—Payment to be for excess of named sum lost " by each and every loss or occurrence "—Daily advances on security of invoices—Fictitious invoices—Whether series of losses or one large loss.

By a policy of insurance, under which the plaintiff bank was to be indemnified against all losses to which it might be put by reason of its having made loans against documents which might prove to have been invalid, it was provided that the insurers were to pay claims only for the excess of $25,000 ultimate net loss " by each and every loss or occurrence." The plaintiff bank agreed in Mar., 1924, to make advances to one B., upon the security of B.'s promissory notes and invoices in respect of goods sold by B., in the course of his business. Almost daily from Apr., 1924, to Nov., 1930, B. sent to the plaintiff bank a number of invoices together with a promissory note for the total amount of the invoices. The amount of the note and invoices was debited to B.'s loan account and credited to his current account, upon which B. was able to draw. From time to time payments of the invoices were received from B. and these were credited to the loan account. The total amount of the invoices on any one day never exceeded $25,000. By sending fictitious invoices, B. obtained from the bank on loan $400,000 more than was owed to him by his customers. In Nov., 1930, B. was insolvent, and in Apr., 1931, he was adjudicated bankrupt. The bank sought to recover the amount of its loss under its policy of insurance :—

Held : each day's loan was a separate loss or occurrence, and, as the loan on any one day never exceeded $25,000, the plaintiff bank could recover nothing under the policy. A

Decision of Porter, J. ([1937] 3 All E.R. 391) *affirmed.*

[EDITORIAL NOTE. The construction of this policy is of importance, since it is impossible in a commercial sense for bankers to deal with such business otherwise than from day to day, and it is therefore necessary to adjust the terms of such policies in view of the decision here made.

As to Bankers' Policies, see HALSBURY, Hailsham Edn., Vol. 18, pp. 506, 507, paras. 784-786 ; and for Cases, see DIGEST, Vol. 29, p. 418, Nos. 3264, 3265.] B

Case referred to :

(1) *Equitable Trust Co. of New York* v. *Whittaker* (1923), 17 Lloyd L.R. 153.

Appeal from a judgment of Porter, J., dated June 25, 1937, and C reported in [1937] 3 All E.R. 391, where the facts are fully set out. They are set out in a shorter form in the judgment of Sir Wilfrid Greene, M.R.

A. T. Miller, K.C., and *Charles Stevenson* for the appellants.

H. U. Willink, K.C., W. L. McNair and *C. A. Roberts* for the D respondent.

Sir Wilfrid Greene, M.R. : The respondent is one of a number of underwriters subscribing to two policies of insurance, dated June 12, 1930, issued to the appellants. Save with regard to the question of E amount, those two policies are in the same form, and it will be sufficient if I read the words which are more immediately appropriate to the present matter. The relevant words of the second of the two policies read as follow :

F

> We hereby agree to hold the assured indemnified for [12 months, July, 1930, to July, 1931] from and against all losses which it may sustain by reason of its having in the ordinary course of business in good faith made advances or loans against or otherwise acted upon any evidences of debt and/or any other securities or documents whatsoever which may prove to have been forged in whole or in part or invalid and/or to have other want of or defect in title.

Then the policy provides that it is intended to cover losses discovered G within the twelve-months' period, or, in the event of non-renewal, within 12 months from expiry date, whether or not they were sustained during the currency of the policy. Then there is a re-instatement clause, and the policy concludes with this :

H

> Notwithstanding anything to the contrary herein contained this insurance is only to pay claims for the excess of $200,000, ultimate net loss, by each and every loss or occurrence.

The actual amount of the policy is $300,000, but it contains that clause which I have just read providing for a franchise of the first $200,000.

The other policy, which, although bearing the same date, appears to be prior in series, was a policy in precisely the same form, subject to this, that the amount covered was $175,000, and there was a franchise of $25,000. Those two sums together make up the $200,000 franchise in the policy from which I have quoted.

Summarising the effect of that for the purpose of stating the problem, the underwriters agree to hold the assured indemnified against losses sustained through their making advances against what, for convenience, I will call invalid documents. In the present case, there is no question that the appellants did make advances against documents which turned out to be invalid. By that expression, I mean a document which comes within the language of the policy. There is no doubt that they thereby suffered loss. The question, however, and the only question, which arises on this appeal is whether the aggregate loss which they have suffered is to be treated as one loss, in which case the franchise clauses will operate only with regard to the first portions of that loss, or as merely an addition of a number of losses with regard to each of which the franchise clause will operate. In the latter case, the appellants will not be able to recover anything, because, in each case, if the true view were that there were a number of losses, due to a number of advances, the loss was below the franchise limit. The sums involved are substantial, because the aggregate loss which the appellants have suffered is $411,521.

The manner in which the losses arose was this. The appellants, who are a well-known banking corporation in the United States, had as a customer a Mr. Brown. Mr. Brown was a coal merchant in a large way of business, and apparently in good credit, and in Mar., 1924, he came to an agreement with the appellants with a view to obtaining provision of credit in connection with his business operations. I say an arrangement with the appellants, but in point of fact it was with their predecessors in title, because there have been amalgamations and so forth, but that point does not affect the present claim, because it is not suggested that the claim, if it be a good one, is a claim unenforceable by the present appellants. The arrangement with Brown, having been initiated with the appellants' predecessors, was continued by the appellants when they came on the scene in their present constitution. The general arrangement between Brown and the appellants is stated in an agreed statement of facts, which I do not propose to read. It is quite sufficient if I summarise the salient portions of it. The bank was to make advances to Brown up to a stated limit, which was from time to time increased. The security which Brown was to provide was to consist of invoices in respect of coal sold to his purchasers—they would, of course, be duplicate invoices, because the original would go to the customer—and a promissory note by Brown for the amount. The giving of that promissory note was due to certain requirements of the currency officials in the United States, which required that loans should be evidenced by something in writing. Then the bank, after receiving the invoices and the note, was to advance to Mr. Brown a sum equal to the face value of the promissory note, which again, in its turn, represented the amount specified in the invoice, or invoices, deposited on any particular occasion. The invoices were to be security for the entire indebtedness of Mr. Brown at any given time. Each invoice was accompanied by an assignment of the debt which it evidenced, but in point of fact no notice was ever given to the customer, and it was a provision of the arrangement that A notice of assignment should not be given to the customer unless the bank should consider it necessary. The method of dealing was to be this. When Brown received from a customer a cheque in payment for the goods specified in an invoice deposited, that cheque he was to hand over to the appellants. The effect of that, of course, was that, whenever B a customer paid the amount which he owed to Brown for the goods invoiced, the deposit of the invoice and the assignment of the debt to which it related ceased to be any security whatsoever, because the debt had been paid by the debtor, and, when Brown paid over a cheque so received, he was paying over the proceeds of the assigned debt, which C was the bank's security for the advance which it made on the occasion of the deposit of the invoice. Then the bank was to open a current account in the name of Brown, to the credit of which the advances from time to time allowed were to be placed. The actual way in which the business was carried out was of this nature. Brown would send almost D daily two letters to the bank. One letter would enclose invoices and a promissory note for the amount of the invoices, and would request an advance of the aggregate amount of the invoices. The other letter would contain customers' cheques for the amounts of invoices which the customers had paid. Upon receipt of those letters, the bank would E carry out in its books these operations. First of all with regard to the request for a loan, the bank would debit Brown's loan account with the amount specified, and would credit his current account with that amount. They also kept a ledger in which they entered particulars of the invoices under the names of the different customers to whom they related. When F the bank received cheques from Brown, they would credit Brown's loan account with the amount of those cheques. The result of that was that, when the amount of an invoice was paid by a customer, and the amount was handed to the bank, Brown's loan account was reduced, and the only way in which it could be again increased was by the subsequent G production of fresh invoices from customers, together with Brown's promissory note. In other words, this arrangement was not a running overdraft in the ordinary sense, under which, subject to a limit, the customer can draw as he pleases. It is not a case where one security is deposited for an overdraft, and the customer is entitled to draw up H to an agreed amount on the faith of that security. It is a case of a different character, because it is only against production of an invoice or invoices that the overdraft limit is allowed to rise. In fact, it operates like a series of permitted overdrafts, each one being permitted on the occasion of the production of particular documents. Indeed, one can put the arrangement in a nutshell by saying that the agreement between the bank and Brown was: "If you, Brown, will produce to us particular documents, if and when you produce such documents, we, the bank, will make available for you a sum equal to the face value of those documents." It was when Brown produced and deposited those documents that he obtained the credit in question. On each occasion, the bank was putting at the disposal of Brown a piece of credit. Each piece of credit was put at his disposal on the occasion of the production of these documents, and without the production of those documents he would never have got the credit.

Just one more word must be said about the course of business. The actual promissory note which was deposited contained a number of rather lengthy provisions relating to the accompanying invoices, and, pursuant to the agreement as stated in the agreed facts between the bank and Brown, each set of invoices deposited was to be a security, not merely for the particular credit which was allowed on the occasion of the deposit of that invoice, or those invoices, but also for the entire indebtedness existing at any given time. Brown at a very early stage in this arrangement embarked upon a career of fraud. The method of working that fraud was, stating it quite broadly, of this nature. He would send to the bank forged invoices. I say forged, perhaps not quite accurately. Whether or not a document is technically a forgery is not relevant. He would send invoices purporting untruly to be invoices in respect of coal which had actually been weighed and shipped to customers, that being the only type of invoice which, under the arrangement, was to be used. By means of those documents, and the promissory notes that he sent with them, he obtained from the bank the credits which the agreement contemplated.

The bank throughout acted in perfect good faith, but Brown, through a number of years, was continuously sending, day by day almost, to the bank these documents, purporting to be true invoices, but in fact nothing of the kind, as they did not represent any coal which had been sold and shipped. When Brown paid off part of his indebtedness to the bank, of course, if the thing had been done regularly, the customers' cheque would equal the amount of the invoice, and therefore would equal the amount of the advance. In point of fact, what happened was that Brown sent in a number of customers' cheques which he purported to marry, if I may use that expression, to previous invoices, and at the same time would send a cheque of his own to make up the balance, because the customers' cheques which he sent—which, of course, were cheques received in respect of real sales—did not equal the amount of the invoices which he was withdrawing. He made up the balance with a cheque of his own, drawn upon his current account. As time went on, the customers' cheques got fewer and fewer, and the balance to be made up by Brown's own cheque grew larger and larger, the reason being that the money which Brown was procuring from the bank by this

method exceeded, and more and more exceeded, the actual sales that
he was making in respect of which he received customers' cheques to
pay into his account. In the end, when the matter was discovered, the
result was that Brown had received advances of some $339,000—I am
disregarding a small dividend which had been received—in respect of
which no valid invoices were held. The bank at the end, with a very A
small exception, was left in the position of having, so to speak, in its
strong-room a number of invalid and worthless invoices, having written
upon them invalid and worthless assignments of the debt to which the
invoice purported to relate, and having in Brown's account a debit
against Brown of over $300,000. That is the position as it ended up. B

In addition to Brown, there is another matter which must be referred
to, and that is a company called the Fairmont-West Virginia Gas Coal
Co., of which Brown owned all the shares, and which he controlled.
That company, subject to some difference in dates and amounts, by a
precisely similar arrangement obtained from the bank credit facilities of C
exactly the same kind, and the arrangement was worked out in precisely
the same way. Frauds of precisely the same character were conducted,
Brown being the person who conducted those frauds on behalf of the
company, and in the end the amount due from the company, as also
the amount due from Brown, proved to be irrecoverable, the figure in D
the case of the company being something over $72,000. I need not go
into the matter of the company any further, because, as I have said,
it was, *mutatis mutandis*, precisely the same as in the case of Brown.

A point was raised in the case which, in the view of the judge, it was
not necessary for him to decide, and that point was this. It was said E
on behalf of the underwriters that in any event the loss suffered by
reason of Brown's operations and the loss suffered by reason of the
company's operations must necessarily be two separate losses, because
they related to advances to two separate entities. In the view which
I take of this case, there is no necessity to go into that question, but it F
was argued—and I may say that, speaking for myself, I entirely agree
with the view which the judge took—that in any case those would have
to be regarded as two separate losses. The real question, however,
which lies at the outset of this case, and which is really the only question
in the case, is whether, having regard to the arrangement between the G
bank and Brown—I will omit the company in what I have to say in the
rest of this judgment; of course it applies equally to the company
mutatis mutandis—the loss suffered by the bank in respect of the account
as a whole is one loss, or is to be treated as a number of losses occasioned
by a number of advances which went to build up the ultimate debit H
on Brown's account.

One thing must be pointed out at the outset, and that is that the
original agreement between the bank and Brown was not produced by
any forged or invalid document, or anything of that kind. If there was
a case where, by means of a forged document—for instance, a forged

mortgage or forged scrip—the bank was persuaded to grant an ordinary running overdraft up to a particular amount, I think that it would be difficult to say that each cheque which the customer drew on that account ought, for the purposes of this policy, to be treated as a separate advance, and that the bank's inability to recover it had resulted in a separate loss. That would be a transaction whereby one forged document had led to the giving of the overdraft, and the loss would be the loss due to the giving of the overdraft on the faith of that forged document. I only mention that case in order to distinguish it from the present. The present case is quite unlike that, because in the present case it is the production, and the production only, of the documents which the agreement contemplates which gives to Brown the credit he desires. Without the production of those documents, the credit would not have been obtained, and, as I have already pointed out, directly he paid over to the bank the proceeds of sale of coal invoiced, that had the effect of reducing the credit facility of Brown by that amount, and he could only get it raised again by producing a fresh set of documents.

Applying the language of the policy to that state of facts, the matter appears to me to be really free from any reasonable doubt. The first question is: Did the bank make advances, or did it otherwise act, upon evidences of debt and/or other securities or documents whatsoever having one of the defects indicated in the policy? The answer quite clearly is that it did. On each occasion when Brown produced evidence of debt, the bank made to Brown an advance, an advance which it would not have made without the production of that evidence of debt. Each production of documents led to a fresh advance, because, as I have said, what happened when the documents were produced was that the loan account was debited with the appropriate amount and the current account was credited. Putting the matter in pictorial language, it was just as though the bank, having two drawers available, when documents came in, put into one drawer cash, on which Brown could draw, and into the other drawer notes, plus the deposited invoices. It was only when the promissory note, plus the invoice, was produced that the cash got into the cash-drawer, and each occasion of production of those documents led to a sum of money being put into that cash-drawer. It seems to me, therefore, that, applying the language of this policy to that state of facts, what really happened was that the bank was making a series of advances against documents. The next question is: Did it sustain any loss by reason of its having done so? If an advance so made proved to be irrecoverable, as the advances did in this case, quite clearly a loss was sustained in respect of that advance. Also, it seems to me that, once one has answered the question whether there was one advance or many advances, one also answers the question: Was there one loss by reason of those advances, or were there many losses by reason of those advances having been made? Directly one has answered the question of what advances were made, one has answered the other question. Thus the argument that was addressed to us on behalf of the appellants, if I may venture to criticise it, began at the wrong end, because, instead of examining the advances and answering that question, it started at the end of the losses, and said—and said attractively at first sight—" The bank has suffered a loss. A customer to whom it lent $400,000, or whatever is the figure, is insolvent, and the loss is the debit balance standing to the debit of that customer's account." At first sight, that looks attractive and businesslike, but it is approaching the matter, in my humble judgment, from the wrong end, because the first thing to analyse is the nature of the operations, in order to see whether the bank made advances. Once that question is examined, it seems to me quite impossible to hold that the bank made only one advance. It made a number of advances, and in each case the advance was made against the documents produced and in response to a separate request.

The arguments that were addressed to us, I think, without doing them an injustice, really fell in substance under two points. It was said that the existence of the original agreement, under which this credit was given, in some way had the effect of grouping into one and amalgamating the various transactions conducted under it, of unifying, so to speak, the operations, with the result that the losses must be treated as one loss arising under that unifying agreement. I cannot accept that view. It appears to me that the existence of that agreement in the present case has no real relevance to the question which we have to decide. Had that agreement itself been produced by an invalid document such as the policy contemplates, different considerations might have arisen, but the agreement is merely the framework, so to speak, into which the subsequent operations fit, and the existence of that framework does not, and cannot, displace the fact that the advances which were made under its cover were advances made against evidences of debt of the character specified in the policy. Those evidences being forged or invalid, the policy operates accordingly. I cannot see myself that there is any real substance in that argument.

Then it was said—and this is the other argument of substance which was put before us—that the loss must be treated as one loss, because, when one looks at the way in which the credit was worked, one finds that one cannot identify any particular invoice with any particular piece of credit. The reason why that is said is that, by the terms of the arrangement and by the express terms of the promissory notes themselves, each invoice was to be security for the entire indebtedness, and not merely security for that piece of credit which was granted on the occasion of its deposit with the bank. Accordingly it was said : " What one really has here is a general debt, growing day by day, secured by a general body of securities fluctuating from day to day, according as new security was brought in and part of the old security dropped out." There again I cannot attribute to that circumstance the force which the appellants would have us attribute to it. It does not appear to me to displace what I have already said, referring to the language of the policy, that the bank made advances against, or otherwise acted upon, those forged invoices. It did so on each occasion that invoices were delivered to it. The circumstance that the amount which was so advanced enjoyed the security of the invoices already held by the bank, and would enjoy the further security of any subsequent invoices that might be deposited, the fact that the invoices deposited were themselves, by virtue of the deposit, security not merely for the advance given on that occasion, but also for the outstanding advances, does not appear to me to alter in any relevant way the facts of the case, because it still remains true that on each of those occasions the bank made advances or loans against, or otherwise acted upon, the invoices delivered to it on that occasion. The fact that the delivery of the invoices had some collateral operation and effect does not appear to me to be relevant to the case.

I think that I have really dealt with all the arguments of substance which were put before us, except perhaps one. It was suggested that some assistance could be obtained from the reinstatement clause. The reinstatement clause is in a familiar form. It provides, in short, that, when a loss occurs, automatically the cover is to be made up again, so as to continue as a cover for the full amount of the policy, the assured being liable to pay the appropriate additional premium. That reinstatement clause contains a proviso to this effect :

> That in no event shall the underwriters be liable on account of any one loss or series of losses caused by the acts or omissions of any one person, or combination of persons, or caused by the same casualty or event, for a greater sum than the amount of this policy.

That proviso appears to me to have a perfectly intelligible operation, and, for the present purposes, is quite colourless. It helps neither the one side nor the other. If that proviso could only be given sense and operation by adopting the argument put forward by the appellants as to the construction of the policy as a whole, there would have been force in referring to it ; but it seems to me that it has a perfectly sensible and obvious operation without the necessity of construing the policy in the way which the appellants desire. It is simply that, although in general cases the reinstatement clause is to operate, yet, if there is one forger, let me say, whose forgeries lead to a number of losses, then the total amount for which the underwriters are to be liable, notwithstanding the reinstatement clause, is to be limited by the amount of the policy. As I say, I think that that proviso is really quite colourless for present purposes.

In the result, in my opinion, the franchise clauses in these policies operate. There have been numerous advances made against documents, or advances or loans against, or actions upon, these documents. Each of those advances or loans ended in a loss, and the franchise clause prevents the assured from recovering until the franchise has been worked off.

There is one more matter to which I omitted to refer, but to which I ought to refer, in the arguments that were addressed to us, and that is this. It is really a variant of, or development of, one of the arguments with which I have dealt, but I think that it requires examination from a rather different aspect. It is said that, when one looks at the ultimate position, one cannot allocate to any particular documents the amount standing to the debit of Brown in his loan account. It seems to me that that is really a misconception. What happened in practice was this. The bank received, let me say, to simplify it, an invoice for $1,000. On receiving that invoice for $1,000, it placed in what I have described as Brown's drawer $1,000 in cash, and the invoice was put in the other drawer. That procedure went on, day after day, for years. In the result, the bank was left with a number of invoices and nothing in the drawer, because Brown had taken all the cash out of the drawer. What, therefore, was the result ? The money which the bank advanced against the invoices which they had still got had gone, because Brown had put it in his pocket. Therefore, it seems to me to be perfectly clear that the acceptance of the invoices which the bank still held, and the making of advances against them, had had the result that that money had disappeared and had become irrecoverable. It is incontestable that Brown has had the money. It is incontestable that the bank has still got the invoices. It seems to me that, once the position is regarded in its true light, this question of identifying a particular part of the total debit on loan account with some particular invoice becomes one which is really quite irrelevant, and not helpful.

The result of the judgment which I have delivered, and of the analysis which I have endeavoured to give of the facts and the arguments, is that this appeal fails, and must be dismissed with costs. If, in the course of this judgment, I have not referred to every point that was argued on behalf of the appellants, it must not be taken that I did not understand it and give it due consideration. Having regard to the fact that we have formed a clear view upon this case, no useful purpose would have been served by reserving judgment, in which case, possibly, some of the detailed matters might have been gone into a little more fully than they have been in the judgment which I have just delivered.

Scott, L.J. : I agree with the judgment which has been delivered. It covers the ground completely, and I therefore do not propose to add anything.

MacKinnon, L.J. : I agree. The problem set us is entirely that of the construction of the policy. Out of its lengthy and not very lucid verbiage, the material words to be construed for the consideration of this case are these :

> We hereby agree to hold the assured indemnified . . . from . . . all losses which it [the bank] may sustain by reason of its having in the ordinary course of

> business . . . made . . . loans against . . . [any written evidences of debt] which may prove to have been . . . invalid . . . this insurance is only to pay claims for the excess of $25,000 [in the one policy] ultimate net loss, by each and every loss or occurrence.

The losses or the loss, in one sense, arose from Brown's insolvency. In that sense, every loss of the type contemplated in the policy arises from the inability of the bank to recover a debt or damages from the person who has defrauded them. In the sense, however, of the losses by reason of the bank having been defrauded by their reliance on documents that are forged, invalid, stolen, or otherwise defective in title, the loss or losses arise from Brown sending them fictitious invoices, and from the bank, relying on the fictitious invoices or invoice, lending him money. When he proved to be insolvent, it was discovered that the bank had suffered as many losses within the meaning of the policy as they had made loans. The fact that the loans were all merged in one general account, and were made at such short intervals, is apt to disguise the real nature of the business. In the course of the argument I suggested to Mr. Miller, as a hypothetical case, the case of a man who in January obtained an advance on a forged warehouse receipt and in May obtained a further advance paid to the same account on another forged warehouse receipt. Mr. Miller agreed that in such a case he could not argue that there was only one loss; there would clearly be two losses. That appears to accord with Mr. Miller's successful argument in the *Equitable Trust Company of New York* v. *Whittaker* (1), which argument was adopted by Greer, J., as he then was, in these words at p. 155

> Now, it is said on the one hand that because these fraudulent documents under this arrangement were presented once a month it was one transaction, and there was only one loss, and the plaintiffs could only claim with regard to one sum of money. Mr. Miller pointed out that the original contract was to advance upon valid documents, and it seems to me each time that they came forward with their forged documents they were engaged in a fresh transaction; that it was a fraud they were committing each time, and in reference to each of these presentations of a forged document a loss occurred. There being no security, they were forged documents.

Except for the fact that there are here many advances, instead of two, and that the interval between these advances was one day, instead of four months, I can see no distinction between this case and the hypothetical one I put to Mr. Miller. The result is that I think this case is indistinguishable from the case decided by Greer, J., and I also think that that case was rightly decided by him, with the result that this appeal fails.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Parker, Garrett & Co.* (for the appellants); *Hair & Co.* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

Re FEVERSHAM SETTLED ESTATE.

[Chancery Division (Farwell, J.), **March 16, 17, 1938.**]

Settlement—Principal mansion house—Original principal mansion house let —Smaller house used as residence by the tenant for life.

The tenant for life of a settled estate was for financial reasons unwilling to retain as the principal mansion house a very large house with 10 reception rooms and 52 bedrooms. The house had in fact been let, and was now let for a long term as a school. The tenant for life had at considerable expense adapted another house on the estate as a residence for himself, expending over £13,000 in making alterations, including drainage work and the installation of electric light. It was contended that the latter house had become the principal mansion house within the meaning of the Settled Land Act, 1925 :—

Held : the question whether or not a particular house is the principal mansion house is a question of fact, and, in the circumstances, the first house had ceased to be, and the second house had become, the principal mansion house of the estate.

[EDITORIAL NOTE. The decision in this case practically follows that in *Re Wythes' Settled Estates* (2), although the facts in the two cases are somewhat different. The term " principal mansion house " is not defined in the Act, but it might be gathered from sect. 65 (2) that a house usually occupied as a farmhouse, or one the site of which together with the pleasure grounds and park and lands occupied therewith do not together exceed 25 acres, is not a principal mansion house. Apart from such operation as this subsection may have, the question of what is at any particular time the principal mansion house is one of fact.

As to Principal Mansion House, see HALSBURY, 1st Edn., Vol. 25, Settlements, p. 641, para. 1116 ; and for Cases, see DIGEST, Vol. 40, pp. 746, 747, Nos. 2765-2771.]

Cases referred to :

(1) *Gilbey* v. *Rush*, [1906] 1 Ch. 11 ; 40 Digest 746, *2768* ; 75 L.J. Ch. 32 ; 93 L.T. 616.

(2) *Re Wythes' Settled Estates*, [1908] 1 Ch. 593 ; 40 Digest 746, *2769* ; 77 L.J. Ch. 319 ; 98 L.T. 277.

Adjourned Summons for the determination of the question whether a very large mansion had ceased to be the principal mansion house of a settled estate, and whether a smaller house, on which the tenant for life had spent a considerable sum in making alterations, had become the principal mansion house.

C. E. Harman, K.C., and *C. Montgomery White* for the Earl of Feversham.

Lindsay M. Jopling for the trustees.

Farwell, J. : The first question which I have to consider is one which I think is not wholly free from difficulty. It arises in this way. The present Earl of Feversham is the tenant for life of a large estate in Yorkshire. The extent of that estate is over 70,000 acres. It is very largely composed of moors, valuable from a sporting point of view, but not otherwise, of course, of very great value, but it is a large estate, which does produce a considerable income. On that estate there is a mansion house known as Duncombe Park. That stands in grounds of about 33 acres, and contains some 10 reception rooms and some 52 bedrooms. It would be expensive to keep up and is the sort of house which, in these days, to most people is in the nature of a white elephant, because there are very few persons—there are some, but not a great number—who could possibly afford to live in, and maintain in anything like a proper state of repair, a house of that size. In this particular case, although A there is a considerable income, it is plain, I think, that the expenditure upon such a house as that, to keep it in a proper state as a principal mansion house, would be out of all proportion to what any reasonable owner would spend on a house in which to live.

The present Earl became tenant for life in 1916. He was born in B 1906, and he came of age in 1927. For some time after he came of age, he lived on this estate, and he was not spending the whole of his income, which was available partly from the estate and partly from other quarters. During his minority, Duncombe Park mansion house had been let on a lease at a rent of £800, to be used as a girls' school. The trustees, who were C then responsible for the matter, came to the conclusion, no doubt perfectly rightly and prudently, that the only way of dealing with a house of such unwieldy size as that was to let it, if they could, and no doubt the only proper way in which a house of this size could be let was to some such institution as a school. Therefore, the trustees took the step, no doubt D perfectly wisely and properly, of granting a lease of the mansion house to the school. That lease has continued, and, when the present Earl came of age, he had to consider what steps he would take with regard to the matter. In his evidence, he has said that he would dearly like to have been able to live at the mansion house, but he came to the con- E clusion, reluctantly, but no doubt perfectly wisely, that it was outside practical policy for him to attempt to make the house his home, and, accordingly, he is about to grant a new lease of the house for a period of some 30 years to the same tenant, to be used for a girls' school, no doubt a very prudent and proper step. Possibly the Earl was lucky to find a F tenant for it at all. The question of a sale of the whole property has been under consideration. That has proved quite impracticable, and the problem for the Earl was, therefore, if he was to live on the estate, and, as is desirable, having a principal interest in the estate, to have a house upon it, to find some place in which he could live. Duncombe Park having G been let, there was no other suitable house. There was one other house, which was small, and not very convenient, but in which his father had lived for a short time before he died, and in which he, the present Earl, had himself lived as an infant. He came to the conclusion that by doing very considerable alterations to this house it would be far more H adaptable for the purposes of a suitable and proper home for himself and for his successors entitled to the estate. For that purpose, he carried out very large and extensive works, which to some extent, at any rate—I am not deciding this now—amounted to rebuilding. He had to make very large alterations to the place, including drainage work and the installation of electric light. As a result, he expended a sum of money, over £13,000, over a period of some two years during which the work was carried out, and the house was made into a not overwhelmingly large, but a reasonable and proper dwelling-house for a person who is the owner of an estate such as this. At the time when the works were carried out, he was a bachelor, and was living largely on the estate, and was content that the expenditure should be defrayed out of income, but he has comparatively recently married the daughter of Lord Halifax. He has become interested in political matters, and has been made parliamentary secretary to one of the government departments, so that he finds it essential that he should live in London some part of his time. For that purpose, he has had to acquire a leasehold house in London, and he finds now that he has less time to spend in Yorkshire, that his expenses as a married man, with duties to be performed in London, and his monetary position, are different from what they were when this work was carried out. In those circumstances, he now comes to the court and asks the court whether he may be recouped out of capital for the expenditure, or, at any rate, if not for the whole, at least for some of it.

In order to determine this question, I have first to consider the question whether it can be properly said that this house, which he has adapted for his own use, can now be treated as the principal mansion house of the estate, on the footing that Duncombe Park has ceased to be the principal mansion house. That Duncombe Park was the principal mansion house originally no one doubts, and, if means allowed, it would still be the principal mansion house. As far as that is concerned, there can be no question. It is now, however, and will be for many years to come, occupied for the purpose of a business—that is, the business of carrying on a school there—and it would be ridiculous to say that, whatever the legal position may be, it is in any ordinary sense of the word the principal mansion house of the estate, so long as it is so used and occupied. That does not determine the question, because what I have to consider is this. A limited owner comes into possession of the property. He finds upon it a house which is undoubtedly the principal mansion house. He finds, for adequate and proper reasons, that it is impossible to use the house as a dwelling-house at all, and accordingly he does not sell and part with it altogether, but lets it on a lease, and proceeds to adapt another house for his own use as a dwelling-house, and then desires the court to say that the original mansion house has ceased to be the mansion house, and that the new house, the house which he has adapted for his own purposes, has become the principal mansion house.

It is curious that there seems to be little or no authority to guide me in this matter. The two cases to which I have been referred do not, I think, carry the matter very far. The first case to which reference was made is *Gilbey* v. *Rush* (1), decided by Kekewich, J. That was a totally different case, but Kekewich, J., did consider what the meaning of "principal mansion house" might be. I do not think—I am not saying it with any disrespect—that it comes to more than this, that it is a question of fact for the court to determine whether or not a particular house is a principal mansion house. The other case is perhaps a little nearer to this case. That was a decision of Eve, J., in *Re Wythes' Settled Estates* (2), but was a different case from this, because there there were two estates, on each of which there was a principal mansion house. They were settled by the same settlement, and the same person was tenant for life of both. Owing to the building operations, and other matters of that sort, one of the houses ceased to be the principal mansion house, and Eve, J., came to the conclusion that, on the facts as proved before him, one of the two principal mansion houses on one of the estates had ceased to be the principal mansion house, with the result that the other mansion house remained the only principal mansion house. Again, the facts are somewhat different from these, because in that case there were undoubtedly two principal mansion houses originally. What Eve, J., held was that, on the facts before him, one of them had ceased to be a principal mansion house. That case hardly touches the question I have to consider—namely, whether a limited owner can, by leasing what is the principal mansion house and moving into another house, or adapting another house for the purpose of his own occupation, change what was the principal mansion house, so that it ceases to be the principal mansion house, and make some other residence the principal mansion house. So far as I can see, there is no authority directly in point on that question. I think, however, that the question whether or not a particular house is the principal mansion house is a question of fact, which the court has to determine on the proper evidence at the time when the application is made, and it is quite impossible to lay down any sort of general principle as to when a mansion house may cease to be a mansion house and when some other residence may become a principal mansion house. No general rule can be laid down at all. It is in each case a question of fact.

In this case, I have this position. I have a house which was undoubtedly the principal mansion house, but which, having regard to the circumstances of the present day, it is quite impossible for the limited owner of the property to use as the principal mansion house. The evidence, apart from one's own knowledge in cases of this sort, is quite plain that such a house as Duncombe Park, having regard to the income of the estate as a whole, is out of the question for the person who is the limited owner of the estate. It is a wholly impracticable proposition, and the only thing to be done, if the sale of it is not possible, is to find a tenant who will take it over, and save the limited owner some part, at any rate, of the expense of its upkeep and maintenance. For the next 30 years, Duncombe Park cannot be treated as the principal mansion house, in the sense that it cannot be occupied by the owner for the time being of the estate, so that, at any rate for a period of time, it will cease to be the principal mansion house, in the sense that it can no longer be the house that was adapted for, and intended to be used as, the house of the owner of the estate. The difficulty I have felt in this case is this. Can a limited owner, in circumstances such as these, when a house which was the principal mansion house ceases to be that principal mansion house, make some other house on his property the principal mansion house? It is conceivable that at the end of 30 years the then owner of the property might be a man of such great wealth that he could afford to live in Duncombe Park, and would desire to do so, that being the house which was undoubtedly the principal mansion house. It would appear to be open to some doubt whether a limited owner can now produce the position in which the original mansion house cannot be treated as the principal mansion house.

On the whole, I have come to the conclusion that I am not precluded from giving effect to what I think, in this particular case, are the true facts. The house itself, Duncombe Park, for all purposes has ceased to be the principal mansion house of this estate, and will continue in that position—not to be the principal mansion house—for, at any rate, some 30 years. Meanwhile, the present owner has found a house which, by expenditure of money upon it, has been adapted for use by him, as the owner of the estate, and is intended to be used by him when he is in residence on the estate. Looking at the matter from a purely practical point of view, the result of that, in my judgment, is that Duncombe Park is no longer to be treated as the principal mansion house of the estate, and, in all the circumstances, I have come to the conclusion that I can properly say that this house, which has now been adapted for use by the tenant for life, is, and should be treated as, the principal mansion house of the estate.

Solicitors: *Trower, Still & Keeling* (for all parties).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MATURIN (BY HER GUARDIAN) *v.* ATTORNEY-GENERAL (MATURIN AND STONE BY HER GUARDIAN CITED).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), **March 11, 1938.**]

Bastardy—Legitimation per subsequens matrimonium—Child conceived pending its mother's divorce proceedings—Presumptive issue of dissolved marriage—Rebutting evidence—Marriage of mother and putative father—Custody prayed in divorce petition by second husband—Declaration of legitimacy—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 188—*Legitimacy Act,* 1926 (*c.* 60), *ss.* 1, 2.

Mrs. S., on Mar. 14, 1929, presented a petition for divorce. In Apr. and May, 1929, she was living apart from her husband and was constantly seeing a man named M. A decree *nisi* on the divorce petition was granted in June, 1929, and was made absolute on Jan. 13, 1930. On Jan. 23, 1930, Mrs. S. gave birth to a child—the present petitioner—and Mrs. S. and M. were married on Mar. 20, 1930. In her divorce petition Mrs. S. made no disclosure of adultery. M. was now seeking a divorce and asking for the custody of the child, and the present petition was for a declaration that the child of M. and Mrs. S. was legitimated *per subsequens matrimonium*:—

HELD: the presumption that the child was the lawful issue of Mr.

and Mrs. S. was rebutted by the evidence, and a declaration ought to be made under the Legitimacy Act, 1926, s. 2 that the child petitioner was a legitimated person within sect. 1 of the Act.

[**EDITORIAL NOTE.** The presentation of a petition for divorce is *prima facie* evidence that the husband and wife are then living apart, and, therefore, of non-access. It will be noted that the petition in the present case is presented for the purpose of supporting an application for the custody of the child in divorce proceedings.

AS TO DECLARATIONS OF LEGITIMACY, see HALSBURY, Hailsham Edn., Vol. 2, pp. 571-574, paras. 783, 784; and FOR CASES, see DIGEST, Vol. 3, pp. 369, 370, Nos. 100-121.]

PETITION under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188, by a child petitioner for a declaration of legitimacy by reason of legitimation *per subsequens matrimonium.* The object of the proceedings was to found a prayer for the custody of the child in the petition (to be heard immediately after) of the putative father for the dissolution of his marriage to the child's mother.

In Sept., 1924, the mother of the child married a man named Stone. A child was born in 1927 which was admittedly the issue of Mr. and Mrs. Stone. On Mar. 14, 1929, Mrs. Stone presented a petition for dissolution of her marriage with Mr. Stone. The child petitioner was born on Jan. 23, 1930, so that the date when the child in question was conceived was presumably later than the date of the petition. In June, 1929, Mrs. Stone was granted a decree *nisi*, and on Jan. 13, 1930—i.e., ten days before the birth of the child in question—that decree was made absolute. In Apr., 1929, a man named Benjamin Francis Maturin was constantly seeing Mrs. Stone, and the contention was that the child was the issue of Mr. Maturin and Mrs. Stone. There was no application in the divorce proceedings by Mrs. Stone for the exercise of the discretion of the court in her favour. Mr. Maturin and Mrs. Stone were married on Mar. 20, 1930. The child having been born within nine months of the dissolution of its mother's marriage, there was a presumption, though rebuttable by evidence, that it was the legitimate issue of the first marriage: HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 2, p. 559. It was proved in evidence that, at the date of his marriage to the mother, Mr. Maturin was domiciled in England, and that Mr. Stone was living apart from his wife at the date when the child in question was conceived. The fact that at the latter date Mrs. Stone's petition for divorce had already been presented was also relied upon as evidence of non-access.

The Legitimacy Act, 1926, s. 1, is as follows:

> (1) . . . where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens.
>
> (2) Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

Richard Ellis for the petitioner.

Valentine Holmes for the Attorney-General.

Ellis : I have to satisfy your Lordship on four separate things : (i) that Diana was the child of Mr. and Mrs. Maturin ; (ii) that at the time she was born neither Mr. Maturin nor Mrs. Stone, as she then was, was married to a third person ; (iii) that after the birth Mr. and Mrs. Maturin were married ; (iv) that Mr. Maturin was domiciled in England. The critical date, the time when the child must have been conceived, in my submission, was during April or May, when the evidence is that they were living together in Beaumont Street and the wife was living apart from Mr. Stone.

Holmes : This is a matter entirely in your Lordship's hands. It is, in fact, the first case of which we have known in which the person asking to be legitimated is presumptively legitimate, but, if your Lordship is satisfied with the evidence of Mr. Maturin, I can see no reason myself why your Lordship should not make the order. It looks as if it were desirable in the interests of the child that the order should be made, for this reason : that, from a letter that was written by Mr. Stone to his wife, it is quite clear that he recognises himself as being the father of only one child, the child born in 1927 to Mrs. Stone and her husband. Thus, I do not think that Mr. Stone would recognise the child who is now asking to be legitimated as his own child.

Hodson, J. : The Act specifically refers to persons whose father or mother was married to a third person when the illegitimate person was born. It looks as if this class of case were considered.

Holmes : Very possibly it was. It just happens that there has never yet been a case of this kind before the courts. That is no reason, of course, why there should not be one now.

Hodson, J. : What do you say about the evidence ?

Holmes : I have read the evidence in the divorce proceedings, and, if your Lordship is satisfied with Mr. Maturin's evidence, I am not going to ask your Lordship not to be satisfied with it. It is difficult to know exactly how it could be proved that Mr. Stone never had access to his wife, except by evidence of the kind Mr. Maturin has given, and therefore I think that possibly your Lordship might think it right to be satisfied. Perhaps I ought to point out that Mrs. Stone did not in fact say anything about this in the previous proceedings. That she ought to have done so I have no doubt. She proved in those proceedings that Mr. Stone had left her some time before the petition.

Hodson, J. : The original petition in the *Stone* case was presented on Mar. 14, 1929. I suppose that that is some indication that they were not living together after that ?

Holmes : Yes. Certainly that would appear from the transcript of the actual proceedings which I have read.

Decree granted in terms of the prayer of the petition. Costs to be paid by the petitioner. In the subsequent petition of Maturin v. *Maturin and*

Boston, HODSON, J., *granted to Mr. Maturin a decree nisi in the exercise of the discretion of the court with the custody of the child petitioner in the previous suit.*

Solicitors: *Ellis, Peirs & Co.* (for the petitioner); *The Treasury Solicitor* (for the Attorney-General).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

Re FIRTH'S ESTATE, SYKES AND LACEY *v.* HALL.

[CHANCERY DIVISION (Farwell, J.), **March 17, 1938.**]

Settlements—Tenant for life and remainderman—Apportionment—Investments sold after death of tenant for life—Dividends partly accrued due during lifetime of tenant for life—Payment of apportioned part out of purchase money to the estate of tenant for life.

The testator died on Dec. 29, 1922. Upon the death of his widow on July 10, 1937, the estate became distributable. Certain investments were sold in order to pay legacy duty and the shares of those beneficiaries who wished to receive them in cash. The shares of other beneficiaries were dealt with by way of appropriation. The trustees, in cases where the interest or the dividend upon the investment was received by them, apportioned it as between the estate of the tenant for life and the remaindermen. The trustees made no apportionment whatever where the investments were sold or appropriated cum dividend. It was contended that, upon the authority of *Re Winterstoke's Will Trusts, Gunn* v. *Richardson* (1), an apportionment should be made in respect of the part of the purchase money representing interest or dividends:—

HELD: no apportionment should be made in respect of the investments sold or appropriated cum dividend.

Decision of CLAUSON, J., *in Re Winterstoke's Will Trusts, Gunn* v. *Richardson* (1) *not followed.*

[**EDITORIAL NOTE.** In the *Winterstoke* case (1), the apportionment of the interest on the investments sold cum dividend was a matter which could be precisely calculated. It was held that, as no difficulty presented itself in such an apportionment, the apportionment ought to be made. Clearly there are many cases in which no such apportionment can be made with precision, although an approximate apportionment may be arrived at. The present case, following previous authorities and general practice over a long period of years, apart from the decision in the *Winterstoke* case (1), holds that there can be no distinction between cases where the apportionment is easy and those where it is difficult, if not impossible, and that the rule is, as it has always been, that no apportionment can be made in the case of a sale or an appropriation cum dividend. It would seem that the rule against apportionment in such cases is now clear, except possibly in cases where the facts are indistinguishable from those in the *Winterstoke* case (1).

AS TO APPORTIONMENT AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 612-614, paras. 1079-1083; and FOR CASES, see DIGEST, Vol. 40, pp. 677-680, Nos. 2132-2157.]

Cases referred to:

(1) *Re Winterstoke's Will Trusts, Gunn* v. *Richardson,* [1938] Ch. 158; [1937] 4 All E.R. 63; Digest Supp.

(2) *Bulkeley* v. *Stephens,* [1896] 2 Ch. 241; 40 Digest 678, *2145*; 65 L.J.Ch. 597; 74 L.T. 409.

(3) *Re Walker, Walker* v. *Patterson,* [1934] W.N. 104; Digest Supp.

Adjourned Summons by which the plaintiffs, two of the trustees of the will of William Eustace Firth, asked for the determination by the court of the following question arising upon the death, on July 10, 1937, of Marie Firth, the tenant for life: whether in the case of the stocks, funds and securities falling within one or other of the several classes in the schedule to the summons or any or which of them (being stocks, funds and securities sold or appropriated to beneficiaries by the plaintiffs as trustees of the will cum dividend or cum interest in due course of administration and in respect of which interest or dividends became or may become payable after such sale or appropriation but in respect of a period either wholly or partly prior to the death of the tenant for life) any and if so what apportionment or adjustment in respect of income in favour of the estate of the tenant for life ought to be or to have been made out of the purchase price or notional purchase price received by the plaintiffs upon such sales or appropriations. Certain other questions did not arise having regard to the decision of the court upon this question.

A. C. Nesbitt for the plaintiffs.

L. B. Tillard for the first and second defendants, executors of the tenant for life.

Wilfrid M. Hunt for the third defendant, who was interested in residue.

Nesbitt stated the facts.

Tillard: Where possible, an apportionment should be made to secure some allowance to the estate of the tenant for life. The only point in this case is as to what should have been done, having regard to the fact that the estate has become immediately distributable on the death of the tenant for life. There is a duty to apportion and adjust in every case. [Counsel referred to *Re Winterstoke's Will Trusts*, *Gunn* v. *Richardson* (1).]

Hunt: The Apportionment Act has nothing to do with this case. It is said that there is some equity which ought to be applied. The onus rests upon the trustees of the tenant for life to show that there is some equity which can be applied, and that it will not be necessary to make application to the court on every occasion. In the present case, there is no direction in terms to transfer. The direction is to hold. It would be a curious result if the equity were to turn upon the exact form of the bequest. Prior to the decision in *Re Winterstoke's Will Trusts* (1), the practice was clearly that the Apportionment Act did not apply, and there is nothing in *Winterstoke's* case (1) to show that the court intended to introduce a general rule the other way. *Re Winterstoke's Will Trusts* (1) is a special case, dependent upon the facts. In the present case, whether or not the sale was made for the purpose of payment of duty, there is no equity which calls for an apportionment in favour of the estate of the tenant for life. [Counsel also referred to *Bulkeley* v. *Stephens* (2), and *Re Walker*, *Walker* v. *Patterson* (3).]

FARWELL, J.: The plaintiffs in this summons are two of the executors and trustees of the will of one William Eustace Firth. They are seeking the direction of the court as to how the proceeds of certain of the securities subject to their trust should be dealt with, now that the tenant for life has died and the stocks are divisible among the persons entitled in remainder.

The question arises in this way. The testator made his will on Dec. 23, 1920. He made a codicil to his will, which is not material, and he died on Dec. 29, 1922. It is not necessary for me to refer to very much of the will, but I must refer to certain parts. Having appointed executors and trustees, the testator made certain pecuniary bequests and specific devises. Then he gave the whole of his real and personal estate to his trustees upon trust either to retain the same or to sell at any time. Then he directed that they should stand possessed of the residue of the trust property and moneys:

> and shall invest the residue of the said moneys in some one or more of the modes of investment hereinafter authorised with power for my trustees or trustee from time to time to vary the said investments into or for any others of the like nature and shall stand possessed of the residue of the said trust property and moneys and the investments for the time being representing the same (hereinafter called my trust estate) upon the trusts following that is to say: Upon trust out of the income thereof to pay to my son Geoffrey Firth the sum of £1,500 a year until he shall assign charge or otherwise dispose of the same or some part thereof. From and after the decease of the said Geoffrey Firth in trust to pay the said sum of £1,500 a year to any wife of my said son who may survive him and whom he shall by his last will and testament or any codicil thereto appoint to receive the same during her life or during any less period which my son may by his said will or codicil appoint and in default of such appointment and so far as any such appointment shall not extend in trust as to as well the income as the property or capital representing the said sum of £1,500 a year for all or such one or more exclusively of the children of my said son at such ages or times in such shares if more than one and in such manner as my said son shall by his will or any codicil thereto appoint and in default of such appointment and so far as any such appointment shall not extend in trust for all the children of my said son who being a son or sons shall attain the age of 21 years.

Then there is a further trust to pay the income of the residue of the trust estate to his wife so long as she remained a widow to:

> hold the residue of my trust estate upon the like trusts and with the like powers and provisions in favour of my son Geoffrey Firth his wife and issue as are hereinbefore directed and declared by cl. 7 of this my will.

Then cl. 9 provides:

> And in case my said son shall die without leaving any issue him surviving who shall live to attain a vested interest in my said trust estate then on failure of such issue and on the death of my said wife and subject to the trusts hereinbefore contained my trustees shall hold my trust estate upon trust to divide the same into 242 equal shares and shall hold 12 such shares upon trust for my nephew Algernon Freeman Firth Hall absolutely and shall hold 26 of such shares upon trust for my niece Gladys Hall absolutely and shall hold 12 of such shares upon trust for my niece Marjorie Hall absolutely and shall hold 24 of such shares upon trust for my nephew Godfrey Robinson.

Then there are certain other trusts to other persons to whom the shares are given absolutely. I do not think it is necessary for me to refer to any other part of the will.

As I have said, the testator died on Dec. 29, 1922, both his widow and

Geoffrey surviving him. Geoffrey died a bachelor in 1931, and thereupon the widow of the testator became entitled to the income of the estate. She died on July 10, 1937. On her death, the estate has become distributable.

At the time of the death of the tenant for life, the testator's estate, other than real estate, was invested, under the provisions of his will, in upwards of 120 separate investments, the great majority of which A are investments quoted, or capable of being dealt with, on the London Stock Exchange. After the death of the tenant for life, certain of the investments were sold in order to pay legacy duty, and certain others were sold in order to pay out the shares of the beneficiaries who wished to receive their shares in cash. In other cases, the shares themselves B were transferred by way of appropriation *in specie* to beneficiaries at the mesne market price ruling at the day of appropriation. In the case of investments in respect of which interest or dividend had been received by the plaintiffs after the death of the tenant for life and before sale or appropriation, and in the case of investments sold or appropriated C ex dividend, the interest or dividend thus received by the plaintiffs after sale or appropriation was apportioned down to the day of the death of the tenant for life, and the relative proportion thereof accrued down to her death was paid or credited to her estate, but many others of the investments were sold or appropriated with the benefit of an accruing D dividend or accruing interest during a period either wholly or partly prior to the death of the tenant for life. The investments sold or appropriated fell into several classes, and the schedule to the summons sets out specimens of each class. Looking at the schedule to the summons, the first class is investments in either government or municipal E loans, British or foreign, carrying a fixed rate of interest. The second class is debenture stocks or fixed interest preference stocks, the interest or dividends on which are not in arrear. The third class is ordinary or deferred stocks or shares upon which the rate of dividend (if any) is unascertainable until declaration. Fourthly, they are debenture stocks F or fixed interest preference stocks, the interest or dividends upon which are in arrear. Then there is a special case which is stated by itself. In the case of the Imperial Tobacco Company "B" preference stock, the dividend received Aug. 3, 1937, in respect of the half-year to Apr. 30, 1937. A further half-year's dividend will be payable in Feb., 1938, in G respect of the half-year to Oct. 31, 1937.

The plaintiffs took the view, acting on advice, that, in the case of all such investments as were sold or appropriated cum dividend, no allowance or adjustment ought to be made out of the purchase price received, or notionally received, by them in respect of any increase of H price caused by the fact that the ensuing interest or dividends upon such investment had commenced to accrue prior to the death of the tenant for life, but, since they have received that advice and acted upon it, their advisers have called their attention to a decision, to which I must refer in a moment, of CLAUSON, J., in *Re Winterstoke's Will Trusts, Gunn* v. *Richardson* (1), which would seem to show, or might appear to show, that the course which they had adopted was one which was not right, in the circumstances, and, very properly, they have come to the court to know what their position is in the matter, and what steps to take.

There is evidence before me from stockbrokers as to the difficulty of arriving at any amount as representing the dividend on a sale in very many cases. The evidence is :

> that having regard to the day-to-day fluctuations in market sentiment and outside influences no fixed rule can be formulated as to the degree to which the imminence of the payment of a dividend or interest upon any given investment is reflected in the price paid by a purchaser, but that (*a*) in cases where a dividend is fixed or has been declared, the price of the investment effected immediately after the same has gone ex dividend will (generally, but not uniformly, speaking) be lower by a sum roughly equivalent to the amount of the dividend so deducted (less income tax) ; and (*b*) in cases where a dividend is not fixed and (although imminent) has not been declared, no calculation could reasonably be made of the increase of price (if any) paid by a purchaser by reason of the imminence of a dividend ; and (*c*) that even in the former class of cases the influence of dividend on price will be incapable of measurement except for a very short period of time immediately before and immediately after the declaration or deduction of the dividend.

Prior to the decision of CLAUSON, J., I think that it was the clearly-recognised rule that in cases of this sort the Apportionment Act did not apply, and that in cases of this kind any equity which the tenant for life might have to any portion of the purchase price of the stock sold or otherwise realised was not an equity which this court was prepared to entertain. The case of *Bulkeley* v. *Stephens* (2), which was decided by STIRLING, J., as he then was, seems to me to make that quite plain. The headnote is this :

> Stock in a public company forming part of a testator's residuary estate was settled upon trust for A. for life, and after her death " to pay transfer and assign my residuary estate and the stocks funds and securities upon which the same shall be invested unto and amongst " certain beneficiaries. After the death of the tenant for life the stock was sold " cum dividend " under an order of the court for the purpose of distribution. This order was made in the absence of the legal personal representatives of the tenant for life. After the sale a dividend was declared and received by the purchaser in respect of profits, a portion of which had been earned prior to the death of the tenant for life :—HELD, that the estate of the tenant for life was not entitled under the Apportionment Act, 1870, to be paid out of the purchase-money of the stock anything in respect of the dividend ; but, inasmuch as if the trust had been strictly carried out in accordance with the terms of the will, by transferring the investments to the beneficiaries, the representatives of the tenant for life would have been in a position, either directly, or through the trustees, to obtain payment of an apportioned part of the dividend, their claim ought under the special circumstances of the case to be acceded to.

It is quite true that in that case, and in the special circumstances of that case in the particular will, STIRLING, J., came to the conclusion that the tenant for life was entitled to some portion of the purchase price as representing dividend, but what the judge said in dealing with the facts, apart from the general rule, makes it, in my judgment, quite plain that he was in that case not applying the general rule at all, but, in the special circumstances of that case, was departing from what was the general rule, as well-settled and ordinarily followed. He cites two earlier decisions, both of them of Kindersley, V.-C., in which any right of the legal personal representative of the tenant for life of such apportionment was not accepted, and says, at pp. 248, 249:

> The reasons given by the Vice-Chancellor are two—first, the absence of any practice giving effect to the equity alleged; secondly, the great burden which the introduction of the practice would cast on trust properties. The first of these reasons seems to be applicable to the present case. No case has been cited in which effect has been given to such a right as is here claimed. I have inquired as to the practice in the registrar's office, and have been informed that no such practice is recognised in the ordinary course of dealing with funds directed to be sold on the death of a tenant for life, and, further, that there is no case in which an order has been made giving effect to the right claimed. As to the second of the Vice-Chancellor's reasons, the burden certainly does not appear so great as on a change of investments—first, because in the latter case the alleged right would arise both on the sale of the original investment sold and on the reinvestment, whereas here it affects the sale only; and, secondly, because changes of investment may take place often, whereas a sale for the purpose of distribution must take place only once for all. Still the burden is considerable. What the legal personal representatives of the tenant for life ought to receive is so much of the purchase money as represents—in the language of the Vice-Chancellor—the value of the proportionate part of the dividend. How is that value to be ascertained? It was suggested that it is to be ascertained simply by finding the dividend actually paid and treating it as subject to a discount of, say, 4 per cent. during the period between the sale and the payment of the dividend. In many cases that might work very considerable injustice. I do not see how it can be determined except by means of the evidence of stockbrokers as to the price at which the stock could have been sold at the actual time of sale ex dividend, the difference between this and the actual price being treated as the value of the dividend. That would, in many cases, result in a conflict of evidence, and the trustees would have to come to the court for protection. Again, in the cases of companies, the distribution would almost always be delayed, and possibly for a long time. Looking at all these circumstances, I am not prepared to introduce any novel practice applicable to the sale of shares in the ordinary course of the execution of a trust consequent on the death of a tenant for life.

As I read that judgment, what Stirling, J., is saying is that down to that date in 1896 there was no such practice as was there contended for on behalf of the tenant for life and his legal personal representatives which would entitle him or them to receive any part of the purchase price. He is saying, having made inquiries in the registrar's office, that he is unable to find any case where the practice has been followed, and he is not prepared himself to introduce any novel practice which in many cases would inevitably throw a heavy burden on the trustees, and might in many cases result in serious questions of fact between the legal personal representative of the tenant for life, trustees, and the ultimate remaindermen. He is saying that it might necessitate in many cases an application to the court, and an expenditure of money which, under the practice then existing, was rendered wholly unnecessary, and he is not himself prepared to adopt any such new practice. That has been adopted, I think it is plain, as being the rule down to the last year. It is to be found stated as the rule in various textbooks on the subject, and it has never been doubted either that that was the way in which trustees could properly deal with matters of this kind or that that was the general practice. As Stirling, J., himself pointed out, and as he decided in this case, there may always be special cases and special circumstances in which the tenant for life or the legal personal representative of the tenant for life may be able to show some special reason why the equity should be asserted in his favour. In the absence of some very special circumstances, however, I think that I am right in saying that the practice has always been, in cases of this kind, that the tenant for life and personal representatives do not get any part of the purchase price on sales of this sort. A

The matter has to be reconsidered, possibly, in the light of the decision of CLAUSON, J., in *Winterstoke's* case (1). The headnote is:

> Where, on the death of a tenant for life, the trustees of the settlement sell securities "cum dividend," and part of the dividend accrued while the tenant for life was alive, the trustees should, if requested so to do, account to the executors of the tenant for life for the proportion of the dividend which has so accrued, so as to preserve the rights which the deceased tenant for life would have had if the securities had been sold "ex dividend." B

CLAUSON, J., there considered the case before STIRLING, J., to which I have just referred. In *Winterstoke's* case (1), the sum involved was a very large one. The first Baron Winterstoke died on Jan. 29, 1911: C

> having by his will, dated July 15, 1907, created certain trusts for two ladies in equal moieties as tenants for life and, subject to those life interests, for various remaindermen. One of the tenants for life died on Aug. 22, 1932, and one moiety of the trust funds was distributed. The other died on Sept. 22, 1936. The moiety of the estate whence her income was derived was about £1,300,000, the estate duty amounting to about £500,000. The estate included ordinary stocks on which the final dividend for the financial year ending on Oct. 31, 1936, was to be declared and payable in Mar., 1937: an interim dividend had been paid to the tenant for life shortly before her death. The trustees sold certain of the stocks to pay death duties, selling in every case "cum dividend" so that no current dividend was received by them. An apportionment of the dividend accruing from the date of the last payment of dividend until the date of the death of the tenant for life showed that the amount was £2,160 13*s*. 1*d*. D

E

Exactly what the investments were in that case is not stated, but I think that it is quite plain that the investments must have been of such a nature that it was easy to ascertain what was the proper proportion, because the trustees had found it possible to work out the proper sum down to a penny. The executors of the tenant for life claimed that they were entitled to that sum, and that was the question which came before CLAUSON, J., and which he decided. CLAUSON, J., in the course of his judgment, said, at pp. 160, 162: F

> In order to deal with the question of principle in simple language, I will take the case of a fund consisting of 10,000 government securities carrying a half-yearly dividend. I will first assume that the trusts are to pay the income to A.B. during his life, after his death to pay the income to C.D. for his life, and, subject to those two life interests, to hold the fund in trust for E.F. A.B. dies at a date at which two months of the current half-year have elapsed. C.D. is surviving, and continues to live until after the end of that half-year. No change is made in the investments. Nobody doubts that it would be the duty of the trustees, on receiving the dividend four months after A.B.'s death, to pay one-third of it to the executors of A.B. and pay the other two-thirds to C.D. Suppose, however, that the trusts are not for A.B. for life and then to C.D. for life, and, subject to their life interests, for E.F., but are for A.B. for life, and, subject to his life interest, for E.F. Under those circumstances it would be astonishing that A.B., by himself or his executors, should receive less income in respect of his life interest than he would have received if, after his life interest, another life interest had been interposed. It is suggested that if, in the simple case that I have put of A.B. being the tenant for life and, on his death, the fund being held in trust for E.F., the trustees sell the securities in the ordinary way on the Stock Exchange—a sale which would carry to the purchaser G H

> the right to receive the whole of the half-yearly dividend—A.B.'s rights are thereby altered and his executors are deprived of the two-months' income from the last dividend date to the date of A.B.'s death, which, it is obvious, in view of the trusts which I have stated, the settlor or the testator intended A.B. to have. In my judgment, the solution of the difficulty is this. The trustees when they sell the securities, ought so to arrange matters as to preserve, if they reasonably can be preserved, the rights of A.B. One way of preserving the rights of A.B. would be to defer the sale until after the half-year has expired. If they do that, no difficulty arises, because the trustees will themselves have received the whole of the half-year's dividend, and they will apportion it, and give the executors of A.B. the third to which they are entitled. I have some reason to believe that in practice this is very often done. It may be, however, that there are inconveniences in deferring the sale until after the end of the half-year, and that the trustees feel that they ought to sell the securities at once, as they did in this case. It would, theoretically, be possible for them to sell to a purchaser on a special bargain that the purchaser, in due course, when the dividend is paid, should account to the trustees, the vendors, for an apportioned part of the dividend, for which they would thereupon account to the executors of A.B. No practical stockbroker would ever advise an attempt to deal with securities on sale by such an artificial method as that. Another way would be simply to sell so that the purchaser receives the dividend and, on the receipt of the purchase price, to set aside out of the purchase price a sum equivalent to the dividend, apportioned as from the last dividend due before the death until the death of the tenant for life, and account for that sum to the executors of the tenant for life. That process will carry out precisely what the testator intended, and will give the tenant for life the income which the testator intended he should have. In the present case the trustees, before the end of the dividend period, sold, and there is no difficulty in ascertaining that figure which would represent the apportioned dividend from the dividend date last preceding the death of the tenant for life to the date of the tenant for life's death. The figure has been ascertained and appears in the summons as £2,160 13*s.* 1*d.* I do not propose to say that trustees who in fact sold under those circumstances and, without the question being raised by anybody, in fact failed to account to the executors of the tenant for life for the apportioned dividend and allowed the whole purchase money to be taken by the remaindermen, would necessarily be liable for breach of trust. In small cases, I dare say even in large cases, it has no doubt been the practice, a practice possibly justified by certain *dicta* of Stirling, J., in *Bulkeley* v. *Stephens* (2), not to make this special reservation for the tenant for life or to account to his executors for the apportioned dividend; but it appears to me that when the question has been raised and there is no difficulty in ascertaining the figure which would be payable to the executors of the tenant for life, the trustees may properly deal and ought to deal with the matter in the way I have indicated, that is to say, by accounting to the executors of the tenant for life for the apportioned dividend. In the present case the executors of the tenant for life claim that that should be done. The trustees ask for the direction of the court whether they should accede to that request and do it. As, in acceding to that request, they seem to me to be carrying out the intention of the testator, and not to be doing any act which is detrimental to, or interferes with, any right of the remaindermen, I propose to declare that the trustees ought, in the present case, not to treat the whole of the purchase price as capital, but ought to apportion it as between, on the one hand, the remaindermen, and, on the other, the executors of the tenant for life, by paying over to the executors of the tenant for life, out of the purchase price, the sum of £2,160 13*s.* 1*d.* . . .

I think that that judgment must be considered with some little care. In the first place, with the greatest possible respect to Clauson, J., I think that it is an understatement to say that "in small cases, I dare say even in large cases, it has no doubt been the practice" not to make a special reservation. I think that the truth is that in every case, except possibly in some very special cases, that has been the practice, certainly ever since the decision of Stirling, J., in 1896, and I think for very many years before that. I think that it is right to say that that practice has been followed almost universally, except in very special cases, and that it has never been suggested that in so acting the trustees have done anything which could be suggested as being a breach of trust, or as being inequitable between the persons beneficially entitled to the estate. In my judgment, it remains the position that, in the ordinary case, apart from some very special circumstances, trustees are still entitled to follow the practice which has been followed for so many years, and I do not myself take the view that Clauson, J., is intending to do what Stirling, J., refused to do in the case before him, and to adopt some novel practice which had not hitherto been the practice at all. What I think he is doing in this case is to say that there may be cases where calculation is very easy, and it is a pure question of finding out the particular sum, a case where the legal personal representatives of the tenant for life think it worth while to assert their right, if they have such a right. Except in some such case as that, trustees are under no obligation to come to the court for directions, and, if they follow what has been the universal practice, in my judgment, for many years, they will not be committing a breach of trust. If, of course, in face of a claim by the legal personal representative of the tenant for life, they insist on pursuing that course, and do not pay any attention to the tenant for life, they may run some risk, and it may be that the tenant for life himself will come to the court, or that the trustees will feel, having regard to the attitude of the tenant for life, that they will be entitled to do so. I am certainly not going to say anything to suggest that, apart from some special circumstances, the trustees have to come to the court, and to incur the cost of a summons, in order to ascertain whether or not they ought to make such apportionment as is suggested in this case. In my judgment, they may safely act on the practice as it is, in the absence of some special circumstances or some special claim by the legal personal representative of the tenant for life.

I would point out that there is, to my mind, a serious difficulty in appreciating exactly what the judge meant in *Winterstoke's* case (1), because he says, at p. 162:

> but it appears to me that when the question has been raised and there is no difficulty in ascertaining the figure which would be payable to the executors of the tenant for life, the trustees may properly deal and ought to deal with the matter [in a particular way].

For myself, I am wholly unable to see what difference it can make whether the calculation is an easy one or a difficult one. If the tenant for life has an equity which he has a right to assert in this court, his right cannot depend on whether the sum which has to be done can be done easily or requires care and consideration. For myself, I do not understand it. I cannot appreciate exactly what the judge had in his mind when he said that. In my judgment, if, because the calculation is a difficult one, the tenant for life has no right to assert any such equity, I do not understand how, because it is easy, he has a right. In my view, the position is that there is nothing to alter the practice which has obtained for many years. As Clauson, J., points out in that case, there may be special circumstances in special cases, and, as Stirling, J., himself pointed out, there may be special circumstances in special cases in which trustees, owing to the claim made by the tenant for life or the legal personal representative, are entitled to come to, and in fact ought to seek the protection of, the court. In the absence of any such cases, there is no necessity for the trustees not to act on what has been for many years an almost universal practice.

In the present case, it is obvious that any calculation which would have to be made would be far from easy. It could be done in the cases of some of the investments, no doubt, but it would be obviously wrong to make a distinction. It must be a case of all or none, and this is not a case where there is no difficulty in ascertaining the figure which would be payable in truth, according to the evidence before me. In some cases, it would be almost impossible, if not quite impossible. In those circumstances, notwithstanding, and in spite of, the decision of Clauson, J., which, in my judgment, does not affect this particular case, I have come to the conclusion that the executors of the tenant for life should not make an apportionment, and, accordingly, I make the declaration asked for.

Solicitors: *Robins, Hay & Waters*, agents for *Lacey & Son*, Bournemouth (for the plaintiff and for the first and second defendants); *Pennington & Son* (for the third defendant).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

BEAUMONT *v.* BEAUMONT.

[Chancery Division (Crossman, J.), **March 4, 1938.** Court of Appeal (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **March 21, 1938.]**

Infant—Custody—Proceedings instituted in court of summary jurisdiction—Whether proceedings can be removed into High Court—Guardianship of Infants Act, 1886 (*c.* 27), *ss.* 5, 9, 10—*Guardianship of Infants Act,* 1925 (*c.* 45), *s.* 7—*R.S.C., Ord.* 55a, *r.* 5.

Proceedings regarding the custody of an infant were commenced in the Hove Petty Sessional Court. The respondent to those proceedings applied to the Chancery Division to have them removed to the High Court:—

Held: (i) there is no statutory right to have such proceedings removed from a court of summary jurisdiction.

(ii) the court will not entertain an application for the exercise of its inherent jurisdiction in such a case while the party making the application keeps the infant out of the jurisdiction.

[EDITORIAL NOTE. Crossman, J., having decided that, upon the proper construction of the Acts, there was no statutory jurisdiction to remove such proceedings into the High Court, an appeal was brought to the Court of Appeal. Upon the appeal the question of the statutory jurisdiction was abandoned by the appellants, and it was sought to invoke the inherent jurisdiction of the court.

As to Proceedings for Custody, see HALSBURY, Hailsham Edn., Vol. 17, pp. 663-665, para. 1381; and for Cases, see DIGEST, Vol. 28, pp. 268-274, Nos. 1210-1253.]

Cases referred to:

(1) *Ex p. Skinner* (1824), 9 Moore, C.P. 278; 28 Digest 263, *1163*.

(2) *Re Cuno, Mansfield* v. *Mansfield* (1889), 43 Ch.D. 12; 42 Digest 704, *1207*; 62 L.T. 15.

ADJOURNED SUMMONS whereby Benjamin Beaumont, the respondent to proceedings regarding the custody of his infant son, Anthony Pitcairn Beaumont, brought in the Hove Petty Sessional Court under the Guardianship of Infants Act, 1886, s. 5, as amended by the Guardianship of Infants Act, 1925, s. 7, asked for an order that those proceedings be removed to the High Court.

The Guardianship of Infants Act, 1886, ss. 5, 9, 10, provide as follow:

> 5. The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just.
>
> 9. In the construction of this Act the expression "the court" shall mean in England the High Court or the county court of the district in which the respondent or respondents or any of them may reside. . . . Any application under this Act to the High Court in England or to the High Court in Ireland shall be made to the Chancery Division of the said courts respectively in such manner as may be prescribed by rules of court.
>
> 10. In England and Ireland when any application has been made under this Act to a county court the High Court of Justice shall, at the instance of any party to such application, order such application to be removed to the High Court, and there proceeded with before a judge of the Chancery Division, on such terms as to costs as it may think proper. In England and Ireland an appeal shall lie to the High Court from any order made by a county court under this Act; and, subject to any rules of court made after the passing of this Act, any such appeal shall be heard by a judge of the Chancery Division of the High Court at chambers or in court, as he shall direct.

The Guardianship of Infants Act, 1925, s. 7, provides as follows:

> (1) For the purposes of the Guardianship of Infants Act, 1886, as amended by this Act, the expression "the court" shall include a court of summary jurisdiction: Provided that a court of summary jurisdiction shall not be competent (*a*) to entertain any application other than an application for variation or discharge of an existing order under the Guardianship of Infants Act, 1886, as so amended, relating to an infant who has attained the age of 16 years, unless the infant is physically or mentally incapable of self support; or (*b*) to entertain any application involving the administration or application of any property belonging to or held in trust for an infant, or the income thereof; or (*c*) to award the payment of sums towards the maintenance of any infant exceeding 20*s*. a week.
>
> (2) The Lord Chancellor may make rules regulating the procedure in courts of summary jurisdiction under this section, and may by those rules make provision for enabling of applications to be heard and determined otherwise than in open court.
>
> (3) Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by this Act, the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court: Provided that, where any such application is made to a court of summary jurisdiction, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order, and in such case no appeal shall lie to the High Court.

W. A. Fearnley-Whittingstall, for the applicant, referred to *Ex parte Skinner* (1) and *Re Cuno, Mansfield* v. *Mansfield* (2).

Crossman, J. : It is to be observed that the Guardianship of Infants Act, 1886, s. 10, gives any party to an application made to a county court an absolute right to have that application removed to the High Court. If that right is not exercised by anybody, and the county court gives a decision, then there is a right of appeal to the High Court against that decision. That being the position under the Act of 1886, I come to the Guardianship of Infants Act, 1925, s. 7. [His Lordship read the section.]

The applicant on this summons contends that the effect of the Guardianship of Infants Act, 1925, s. 7 (1), is to make sect. 10 of the Act of 1886 applicable to an application to a court of summary jurisdiction, and that he is entitled to have proceedings in the petty sessional court removed to the High Court. I am unable to accept that contention. In my judgment, the effect of the Guardianship of Infants Act, 1925, s. 7 (1), is to extend the interpretation of the expression "the court," which is contained in sect. 9 of the Act of 1886, so as to include in the meaning of the expression "the court" in that section a court of summary jurisdiction, but not to extend the meaning of the expression "a county court" in sect. 10 of the Act of 1886 so as to include in the meaning of the last-mentioned expression a court of summary jurisdiction.

It is to be observed that sect. 7 (3) of the Act of 1925 provides expressly for an appeal from an order of a court of summary jurisdiction. This would be unnecessary if the expression "the county court" in sect. 10 of the Act of 1886 had been extended so as to include a court of summary jurisdiction, because then the appeal would already have been provided for. It is also to be observed that the proviso to sect. 7 (3) of the Act of 1925 gives a court of summary jurisdiction a power which is not given to the county court by the Act of 1886—namely, a power to consider and come to the conclusion, if it thinks fit, that the matter is one that can more conveniently be dealt with by the High Court. That subsection enables the court of summary jurisdiction to decline to act, and puts the matter at large again, and leaves the applicant to go to another court for relief. Although, of course, it does not affect the construction of the Act, I note that R.S.C., Ord. 55a, which deals with applications under the Guardianship of Infants Act, 1886 and 1925, provides by r. 5 for the case of removal from a county court under sect. 10 of the Act of 1886, the rule providing, so far as material:

> Upon any application under sect. 10 of the Act of 1886 for an order of removal from a county court to the High Court it shall not (unless otherwise ordered) be necessary to serve the originating summons upon any person. . . .

Other provisions follow, but the order does not appear to attempt to make any provision for the case of removal from a court of summary jurisdiction.

On the whole, I am of opinion that a party to an application to a court of summary jurisdiction under sect. 5 of the Act of 1886, as extended by sect. 7 of the Act of 1925, has no right to insist on the matter being removed from a court of summary jurisdiction to the High Court. In those circumstances, I cannot make any order on the present summons.

The applicant appealed.

Maurice Healy, K.C., W. A. Fearnley-Whittingstall, and *D. K. C. O'Malley* for the appellant.

The appeal was dismissed in the course of the argument as follows:

Sir Wilfrid Greene, M.R.: As I understand it, you do not now argue that the statutory power of removal applies to this case, and you wish to invoke the inherent power in the Court of Chancery, as you say, to remove these proceedings?

Healy, K.C.: Yes, my Lord.

Sir Wilfrid Greene, M.R.: With regard to that, the court takes this view. If you are invoking the inherent jurisdiction of the Court of Chancery with regard to infants, and if you are saying, or are going to say, that that gives it power to remove the case from the petty sessional court, the Court of Chancery will not listen to you so long as you keep the child out of the jurisdiction. If you were basing your argument on a statutory obligation placed upon the court to remove, as there is in sect. 10, then different considerations might apply. Directly you shift your ground and invoke the inherent jurisdiction, however, then you immediately place yourself in the position that the court will not listen to you so long as you are keeping the infant out of the jurisdiction. Do not take it from anything I have said that this court is even attracted by the proposition that the inherent jurisdiction of the court can take away the statutory jurisdiction of the court of petty sessions. Even assuming in your favour that the court's inherent jurisdiction would enable it to override the statutory jurisdiction of the court of petty sessions, the Court of Chancery would not listen to the invoking of that inherent jurisdiction so long as you kept the infant out of the jurisdiction.

Healy, K.C.: Even if the inherent jurisdiction were one to which the subject was entitled as of right?

Sir Wilfrid Greene, M.R.: There is no such thing as being entitled as of right in these circumstances. Once you come to the court to invoke its inherent jurisdiction with regard to an infant, the court is completely master of the situation, and can refuse to hear you so long as you do a thing which you ought not to be doing—that is to say, keep the infant out of the jurisdiction. The statute is dealing with two inferior courts, county courts and courts of petty sessions. In the case of county courts, there is an express power of removal; in the case of petty sessional courts, the statute is silent. Are you going to say that in view of that there is some power outside the statute to deprive the court of petty sessions of the jurisdiction that the statute has given?

Healy, K.C.: The difficulty that is in my way there is that there is no express provision in the statute which gives the absolute right.

Sir Wilfrid Greene, M.R.: You are in this difficulty. The court is not going to listen to you starting to argue the point if you are going to invoke any inherent jurisdiction of the court.

Appeal dismissed.

Solicitors: *C. A. Russ & Son* (for the applicant).

[*Reported by* T. A. DILLON *and* REGINALD TOWNSEND, ESQS., *Barristers-at-Law.*]

Re HEYWOOD'S CONVEYANCE, CHESHIRE LINES COMMITTEE *v.* LIVERPOOL CORPORATION.

[CHANCERY DIVISION (Simonds, J.), **March 25, 1938.]**

Compulsory Purchase—Covenant not to use for authorised purposes—Validity. Sale of Land—Restrictive covenants—Annexation of benefit—Insufficient description of land to be benefited.

In 1876, a railway company acquired by compulsory purchase a plot of land for the purposes of their undertaking. The company entered into a covenant with the vendor, his heirs and assigns that "no engine works or sheds locomotive works or sheds fitting-sheds or any buildings for the purpose of manufacture or business other than goods or passenger stations or signal-boxes or sidings in connection with the railway or stations shall be erected on any lands belonging to or to be acquired [by the company] from J. P. H. his heirs or assigns without the consent of the said J. P. H. his heirs and assigns." The company desired to sell the plot of land to persons who wished to erect a public-house thereon. In 1920, and in 1924, the Liverpool Corporation acquired the adjacent land formerly owned by J. P. H., and claimed to be able to enforce the covenant and prevent the erection of the public-house:—

HELD: (i) the covenant, even if originally valid, was not a covenant which ran with the land so as to enure for the benefit of the purchasers, because there was no sufficient description of the land to be benefited.

(ii) there was no enforceable covenant in any event, because the covenant originally entered into was void under the rule in *Ayr Harbour Trustees* v. *Oswald* (1).

[EDITORIAL NOTE. Where a body has statutory power to take land compulsorily for a particular purpose, that body cannot bind itself and its successors not to use the land for the authorised purposes. This principle was laid down in *Ayr Harbour Trustees* v. *Oswald* (1), and is held to be decisive of this case; although the covenant only refers to some of the authorised purposes along with matters having no reference to such purposes. The covenant is also held to be unenforceable by reason of the fact that the land to be benefited thereby is not sufficiently described in the conveyance, applying the recent decision in *Zetland* (*Marquess*) v. *Driver* (3).

AS TO COVENANTS NOT TO USE LAND FOR AUTHORISED PURPOSES, see HALSBURY, Hailsham Edn., Vol. 6, pp. 49, 50, para. 47; and FOR CASES, see DIGEST, Vol. 11, p. 103, Nos. 1-5.]

Cases referred to:

(1) *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623; 11 Digest 103, *4*.

(2) *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.*, [1926] A.C. 355; Digest Supp.; 95 L.J.Ch. 587; 134 L.T. 673.

(3) *Zetland* (*Marquess*) *and Zetland Estates Co.* v. *Driver*, [1938] 2 All E.R. 158; Digest Supp.; *revsg.* S.C., [1937] 3 All E.R. 795.

(4) *Re South Eastern Ry. Co. and Wiffin's Contract*, [1907] 2 Ch. 366; 11 Digest 120, *130*; 76 L.J.Ch. 481; 97 L.T. 576.

(5) *Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corpn.*, [1910] 2 Ch. 12; 11 Digest 120, *131*; 79 L.J.Ch. 455; 102 L.T. 629.

(6) *Osborne* v. *Bradley*, [1903] 2 Ch. 446; 40 Digest 329, *2780*; 73 L.J.Ch. 49; 89 L.T. 11.

(7) *Re Ballard's Conveyance*, [1937] Ch. 473; [1937] 2 All E.R. 691; Digest Supp.; 106 L.J.Ch. 273; 157 L.T. 281.

SUMMONS under the Law of Property Act, 1925, s. 84 (2), for a declaration that no part of certain land is affected by any of the restrictions contained in a deed dated June 24, 1874, which is recited in a conveyance dated Feb. 3, 1876

Cyril J. Radcliffe, K.C., and *Wilfrid M. Hunt* for the plaintiffs.

H. P. Glover, K.C., and *W. Lyon Blease* for the defendants.

Radcliffe, K.C.: The Liverpool Corporation are not assignees of the benefit of the covenant, and, having regard to the deeds, it is clear that no land can be identified of which it can be said with certainty that it is affected. Also, if a statutory corporation acquires land for the purpose of its undertaking, it cannot fetter itself with a covenant which impedes the best development of that land for the purpose of the undertaking. The persons who wish to purchase from the plaintiffs desire to erect a public-house. The defendant corporation claims to be entitled to object by reason of this covenant, and does so object. It is impossible for anybody to extract from the documents the extent of the land which was to be benefited by the covenant. It is an unlikely supposition that it was to inhere in each portion of land owned by Mr. Heywood at any time. If the defendant corporation cannot claim that the benefit of the covenant attaches to defined land, it cannot claim at all. [Counsel referred to *Ayr Harbour Trustees* v. *Oswald* (1), *Re South Eastern Ry. Co. and Wiffin's Contract* (4), *Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corpn.* (5).]

Glover, K.C.: The covenant in this case is quite clear. The plaintiffs may not erect any buildings for manufacture or business, other than goods or passenger stations or signal-boxes and sidings in connection with the railway, without obtaining consent. It is difficult to see that that would be incompatible with their statutory duties. The plaintiffs can sell part of their statutory birthright provided that by so doing they will not be acting inconsistently with the purpose for which the land was acquired, or incompatibly with the duties and obligations imposed upon them by Parliament when the powers of compulsory purchase were conferred. We know now that the land never was required by the plaintiffs. If it was not required by them, it may be unobjectionable of them to enter into covenants restricting their rights. The plaintiffs entered into a voluntary agreement, and it has the effect of binding them, because the words are so very clear. At the time the covenant was entered into, Mr. Heywood owned the land surrounding the railway. The original covenant was contained in the document of June 6, 1874, and it is recited in the later document, so far as material. It is only material to show what was the restriction and not the form. It is just as reasonable to assume that it was for the benefit of certain defined land as to assume that it was not. There is no difficulty in identifying the land it was intended to benefit. The covenant was for the benefit of the whole estate. The whole of the circumstances should be looked at with a view to ascertaining the intention of the parties. Apt words are not necessary if it can be inferred from the documents that it was the intention to annex the benefit of the covenant to the particular land. [Counsel referred to *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corporation* (2), *Ayr Harbour Trustees* v. *Oswald* (1), *Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corpn.* (5), *Osborne* v. *Bradley* (6), *Zetland (Marquess)* v. *Driver* (3), *Re Ballard's Conveyance* (7).]

Radcliffe, K.C., in reply: No one can now say what was the extent of the estate to which this covenant could attach. The estate could not have been of less than 500 acres. It is said that the covenant was intended to inure for the benefit of all the estate. That would mean that the covenant would attach to any part or portion of that land. The plaintiffs would be taking upon themselves an impossible burden if they had to ask the consent of the purchaser of every part of that land.

Simonds, J.: The claim of the plaintiffs is based upon two contentions. In the first place, it is said that, assuming the original validity of the covenant contained in the conveyance of Feb. 3, 1876, or if there was such a covenant in the deed of June 24, 1874, at any rate it is not enforceable by the defendant corporation, upon the ground that it was not a covenant which ran with the land so as to enure for the benefit of the purchasers, the defendant corporation. It is said, in the second place, that there is no enforceable covenant in any event, because the covenant originally entered into was void and of no effect, under the doctrine of the well-known case of *Ayr Harbour Trustees* v. *Oswald* (1). In my view, both those contentions are well-founded.

The Cheshire Lines Committee is a corporation which, under an Act of 1874, was empowered by sect. 4 to enter on, take and use certain lands

> described in the deposited plans and books of reference as they require for purposes of works authorised by this Act or other purposes of the undertaking belonging to or under the management of the committee.

Under sect. 6 of the same Act, subject to the provisions of the Act, the committee were authorised to make and maintain certain works which are there more specifically described.

The land the subject of the present application was land which was included in the lands described in the deposited plans and books of reference. Accordingly, it was land in regard to which the plaintiffs were by the legislature given certain statutory powers. Those powers they could not sell, to use the words of Lord Sumner in the later case of *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corporation* (2), because it was part of their statutory birthright, of which they could not rid themselves, to enter upon and use these works for all the purposes which the legislature has prescribed, and the Act contained no provision specifically protecting the owners of the lands in question in any way. Although the Act contained no such provision, however, the parties, by a bargain entered into by the conveyance of Feb. 3, 1876, to which I have referred, purported to bind themselves in this way: the committee covenanted with one John Pemberton Heywood, his heirs and assigns, that the committee, their successors or assigns

> will at all times hereafter observe perform and keep all and every the stipulations provisions and conditions which on the part of the said committee their successors and assigns ought to be observed performed and kept and which are comprised in an indenture dated June 24, 1874, and made between the said John Pemberton Heywood of the first part Hugh Heywood Jones of the second part and the said committee of the third part by which indenture the said committee for themselves their successors and assigns agreed with the said John Pemberton Heyoood his heirs and assigns and also with the said Hugh Heywood Jones his heirs and assigns that if the Cheshire Lines Act 1874 should pass into law during the then present session of Parliament and the said line of railway No. 3 should be made the same should be constructed through the estates of the said John Pemberton Heywood and Hugh Heywood Jones in accordance with the provisions of the said indenture stated and not otherwise which last-mentioned provisions so far as they are material are set forth in the second schedule hereunder written.

In fact the deed there referred to of June 24, 1874, has been lost. Therefore, all that one knows about the deed and what it contained is to be ascertained from the second schedule to the deed that I am now reading. However, that probably is immaterial, because this deed itself contains a covenant which, if it is otherwise valid, sufficiently defines the rights of the parties. The second schedule contains no opening words. It is simply a statement of the restrictions which were contained in the deed of June 24, 1874, and the only material one is this:

> No engine works or sheds locomotive works or sheds fitting-sheds or any buildings for the purpose of manufacture or business other than goods or passenger stations or signal-boxes and sidings in connection with the railway or stations shall be erected on any lands belonging to or to be acquired by the committee from the said John Pemberton Heywood his heirs or assigns without the consent of the said John Pemberton Heywood his heirs or assigns or on any land belonging to or to be acquired by the committee from the said Hugh Heywood Jones his heirs or assigns without the consent of the said Hugh Heywood Jones his heirs or assigns.

If one can imagine those words of restriction inserted into the Act, it would clearly amount to a substantial restriction of the statutory purposes for which the legislature was authorising the acquisition of these lands. That is something which clearly cannot be done, in view of the case to which I have referred, *Ayr Harbour Trustees* v. *Oswald* (1), a case too often cited for it to be necessary for me to refer to it. I need refer only to the words of LORD BLACKBURN, at p. 634:

> I think that where the legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with

> such powers ; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void.

The contract which I have read is just such a contract. It is a contract not to use the land for certain purposes, which the legislature has authorised. Accordingly, it is a contract which is void, whence it follows that it is a covenant which is not enforceable by the corporation against the Cheshire Lines Committee. However, assuming that I am wrong in that, and that this is a valid covenant, the question still remains whether this is a covenant which is now enforceable by the Corporation of Liverpool. That depends upon whether the land which is intended to be benefited is so defined as to be easily ascertainable, and whether the covenant is so drawn that it is imposed for the benefit of that particular land, a fact which should be either stated in, or a matter of clear inference from the face of, the document.

I have the benefit of a transcript of the recent decision of the Court of Appeal in *Zetland* (*Marquess*) *and Zetland Estates Co.* v. *Driver* (3), a judgment given as recently as Mar. 17, 1938, in which the judgment of the court was given by Farwell, J., then sitting as a member of the court, where he sets out the conditions of enforcement of a covenant by a successor in title of a covenantee. He deals with a number of conditions, which I need not read, and then says, at p. 161 :

> Thirdly, the land which is intended to be so benefited must be so defined as to be easily ascertainable, and the fact that the covenant is imposed for the benefit of that particular land should be stated in the conveyance, and the persons or the class of persons entitled to enforce it should also be so stated.

In this case, these are the facts as I know them. I know that in 1874 John Pemberton Heywood was possessed of considerable property in this neighbourhood. I know that a small parcel of that property was the subject of the conveyance to the Cheshire Lines Committee. I know that he died in 1877, possessed of a considerable estate, and I know—or am content to assume, although it is not strictly proved—that substantially the whole of the estate of which he died possessed is now in the ownership of the Liverpool Corporation, although it did not come to them by one title or under one purchase, but derivatively, under the will of John Pemberton Heywood via an intestate devisee and the devisee of that devisee, but, again, not of any one part, because different parts of the original testator's property went in different ways under his will. I do not know, and I think that there is nothing which would justify me in coming to any conclusion upon it, what other property John Pemberton Heywood had in 1874, beyond that of which he died possessed in 1877 and which formed the estate of which substantially the whole is now in the possession of the Liverpool Corporation.

Upon those facts, am I justified in saying that the land for the benefit of which the covenant was imposed is easily ascertainable, or that I can infer from the face of this document what is the land for the benefit of which the covenant is intended to be imposed ? It appears to me that I cannot possibly do so. All I know is that that covenant is made with John

Pemberton Heywood, his heirs and assigns, and the only indication I have of any definition of any land at all is the reference in the covenant to the document of June 24, 1874, which itself contains a reference to the construction of the railway through the estate of the said John Pemberton Heywood. Upon that material, I find it quite impossible to say what is the land for the benefit of which this covenant was intended to be imposed. Accordingly, it does not appear to me that it is a covenant the benefit of which can be said to enure to the Liverpool Corporation, the purchasers, by a number of titles to the land of which John Pemberton Heywood at his death died possessed. In those circumstances, on that point also, I must make the declaration asked for in this case.

Declaration that no part of the said land is affected by any of the restrictions contained in the said conveyance or the said deed.

Solicitors: *Slaughter & May* (for the plaintiffs); *F. Venn & Co.*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

DARLOW *v.* SPARKS.

[CHANCERY DIVISION (Bennett, J.), **March 18, 22, 1938**.]

Gifts—Donatio mortis causa—Document of title handed over—War Savings Certificates and National Savings Certificates.

Shortly before her death, a woman, using words of gift, handed to her father certain war savings certificates and national savings certificates, with the intention of passing the property in them. The husband of the woman claimed to be entitled to them:—

HELD: war savings certificates and national savings certificates are capable of being the subject-matter of a *donatio mortis causa.*

[**EDITORIAL NOTE.** Physical delivery of a chose in action is impossible, and therefore the delivery of a document essential to its enforcement may suffice to support the contention that there is a valid *donatio mortis causa.* The present case adopts the generally accepted rule that the document that is delivered must show the terms of the contract between the parties.

AS TO DELIVERY IN THE CASE OF *Donatio Mortis Causa,* see HALSBURY, Hailsham Edn., Vol. 15, pp. 744-746, para. 1286; and FOR CASES, see DIGEST, Vol. 25, pp. 543-548, Nos. 300-342.]

Cases referred to:

(1) *Re Weston, Bartholomew* v. *Menzies,* [1902] 1 Ch. 680; 25 Digest 544, *302*; 71 L.J. Ch. 343; 86 L.T. 551.

(2) *Moore* v. *Darton* (1851), 4 De G. & Sm. 517; 25 Digest 541, *288*; 20 L.J. Ch. 626; 18 L.T.O.S. 24.

(3) *Duffield* v. *Elwes* (1827), 1 Bli. N.S. 497; 25 Digest 549, *351.*

(4) *Re Andrews, Andrews* v. *Andrews,* [1902] 2 Ch. 394; 25 Digest 546, *314*; 71 L.J. Ch. 676; 87 L.T. 20.

ACTION to recover war savings certificates and national savings certificates, or their value, on the grounds that there had not been a valid *donatio mortis causa* and that the property in such certificates was not capable of transfer by *donatio mortis causa.*

Constantine Gallop for the plaintiff.

E. M. Winterbotham for the defendants.

Gallop: There have been conflicting decisions upon the question whether securities of these kinds can be the subject-matter of a *donatio mortis causa.* So far as there is any approach to any principle, it seems to be that, if a document shows on its face substantially what are the terms between the debtor and the creditor, the document can be handed over as an effective transfer of the chose in action evidenced by such document. The money cannot be transferred without the consent of the Postmaster-General, unless the court is going to hold that it can be the subject of a valid transfer on death in any event. It is conceded that if a man expresses his wish to hand over his chose in action, that is sufficient in equity. Once a party makes it plain to another that he wishes him to have the benefit of a chose in action, that is sufficient. [Counsel referred to *Re Weston, Bartholomew* v. *Menzies* (1), *Moore* v. *Darton* (2), *Duffield* v. *Elwes* (3), *Re Andrews, Andrews* v. *Andrews* (4).]

BENNETT, J.: In this case, I have already decided in point of fact that, on her deathbed, and in contemplation of death, Florence Emily Darlow, who was the wife of the plaintiff, handed to the second defendant, Henry James Sparks the elder, six books, three relating to war savings certificates and three to national savings certificates of which she was the registered holder, with words of gift, her intention being to give the money represented by the certificates to her father (the second defendant) in case of her death. The question that remained to be decided was whether the war savings certificates and the national savings certificates were capable of being the subject of a *donatio mortis causa.* That is the question which has been discussed. There are numerous documents which, in the course of the last two centuries, seem to have been the subject of consideration in courts of equity as to whether or not they were good subject-matter for a *donatio mortis causa,* and, as Mr. Gallop has said, it seems to be difficult to ascertain whether there is any clear principle upon which the court has acted in deciding, as sometimes they have, that the document is—and, sometimes, is not—the subject of a good *donatio mortis causa.* It is, I think, sufficient for me to say that I regard these certificates as substantially indistinguishable from a deposit in the Post Office Savings Bank, which has been held to be the subject of a good *donatio mortis causa* when the donor, on his or her deathbed, has handed to the donee, with adequate words of gift, the Post Office Savings Bank book. The books with which this case is concerned indicate that the person named on the covers of them, subject to the terms and conditions printed on the covers, is entitled, five years after he has paid 15*s.* 6*d.*, to £1. The war savings certificates and the national savings certificates are in substantially the same terms, and on the covers both of the national savings certificate books and of the war savings certificate books are printed the terms of the contract.

In *Re Weston, Bartholomew* v. *Menzies* (1), where BYRNE, J., held that the delivery of a Post Office Savings Bank book by a man on his deathbed to a donee, with adequate words of gift, operated to pass the cash on deposit, the judge so held on the ground that the test appeared to be whether the document which was handed over, besides acknowledging the receipt of the money, expressed the terms on which it was held, and showed what the contract between the parties was. That was the ground on which he decided that a Post Office Savings Bank book, when given, could operate to pass the gift of the donor's money in the bank in contemplation of his death. In my judgment, there is no valid distinction between a Post Office Savings Bank book and these war savings certificates or national savings certificates, and, following that decision of BYRNE, J., I decide that these war savings certificate books and national savings certificate books are the subject-matter of a good *donatio mortis causa.*

Action dismissed with costs.

Solicitors: *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, Worthing (for the plaintiff); *Vizard, Oldham, Crowder & Cash*, agents for *Parker, Bangor-Jones & Palmer*, Worthing (for the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

JONES *v.* BATES.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Farwell, J.), **January 21, 24, 25, March 21, 1938.**]

Highway—Public footpath—Presumption of dedication—" Enjoyed by the public as of right "—Rights of Way Act, 1932 (*c.* 45), *s.* 1.

(i) The words in the Rights of Way Act, 1932, s. 1 (1), " actually enjoyed by the public as of right and without interruption," mean that the way has been used without compulsion, secrecy, or licence, *nec vi, nec clam, nec precario.*

(ii) [*per* SCOTT, L.J.] The party asserting the right of way has not to prove the absence of compulsion, secrecy, or licence. It is for the party denying the existence of the right of way to prove compulsion, secrecy, or licence.

(iii) [*per* SCOTT, L.J.] A mere discontinuance of user does not amount to interruption. This can only arise from an interference with the enjoyment of the right of passage.

(iv) [*per* FARWELL, J.] Where the user is for a period of less than 20 years, it is still possible, notwithstanding the Act of 1932, to prove the existence of a public right of way by implied dedication.

[**EDITORIAL NOTE.** While the question of the existence of public right of way is largely a question of fact, the precise alteration made by the passing of the Rights of Way Act, 1932, is an important question of construction. This question is here discussed at considerable length by SCOTT, L.J., and his judgment herein is for the present the most helpful exposition of the effect of this statute.

AS TO RIGHTS OF WAY ACT, 1932, see HALSBURY, Hailsham Edn., Vol. 16

pp. 223-225, paras. 269-271; and FOR CASES, see DIGEST, Vol. 26, pp. 293-303, Nos. 245-345.]

Cases referred to:

(1) *Folkestone Corpn.* v. *Brockman*, [1914] A.C. 338; 26 Digest 284, *189*; 83 L.J.K.B. 745; 110 L.T. 834; *revsg.* S.C. (1912), 107 L.T. 483.

(2) *Hue* v. *Whiteley*, [1929] 1 Ch. 440; Digest Supp.; 98 L.J.Ch. 227; 140 L.T. 531. A

(3) *De La Warr (Earl)* v. *Miles* (1881), 17 Ch.D. 535; 11 Digest 10, *78*; 50 L.J.Ch. 754; 44 L.T. 487.

(4) *Merstham Manor, Ltd.* v. *Coulsdon & Purley Urban District Council*, [1937] 2 K.B. 77; [1936] 2 All E.R. 422; Digest Supp.; 106 L.J.K.B. 603.

(5) *Mann* v. *Brodie* (1885), 10 App. Cas. 378; 26 Digest 281, *177*. B

APPEAL from a judgment of His Honour JUDGE ARCHER, K.C., sitting at Hastings County Court, dated June 15, 1937.

W. R. H. Steer for the appellant.

F. R. Evershed, K.C., and *Eric Neve* for the respondent.

C

SLESSER, L.J.: In this action, Miss Alice Jones complains that a Mr. Edward Bates claimed a right of way over her property known as Hope Farm, Beckley, and alleges that he has been guilty of trespass in using it. By his defence, the defendant disputes this claim, upon the ground that the right of way alleged was a public footpath. At one D time he had claimed for himself an easement over the path in question as a private right appurtenant to a farm owned by him, but that claim has been abandoned, and forms no part of the subject-matter of this appeal. The defendant now relies upon a notional dedication to be presumed under the Rights of Way Act, 1932, and does not in this E appeal contend that he could at common law prove that there was any express dedication of the land as a footway, or that any inference of dedication ought properly to be drawn. I turn, therefore, at once to the Rights of Way Act, 1932, s. 1 (1), which is in the following terms:

> Where a way, not being of such a character that user thereof by the public F could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way. G

As to the existence of a defined way, the county court judge has, I think, impliedly found as a fact that it existed. It is a path going across Hope Farm, the property of the plaintiff, and dividing beyond Hope Farm into a northern and a southern branch. He has come to the conclusion that the evidence did not satisfy him that this path, with its H northern branch, was a public way within the meaning of sect. 1 (1) of the 1932 Act, but he refers to it as a footpath, and I think that it would be wrong to assume that his judgment has not been given except upon the assumption that it was proved to his satisfaction that there was a way across the plaintiff's premises, albeit not a public one.

If this view of his finding be correct, it was next incumbent upon those claiming that such a way should have been deemed to have been dedicated as a highway to quote the language of sect. 1 (1) of the 1932 Act, to show that the way has been actually enjoyed by the public as of right and without interruption for a full period of twenty years. The critical words of the section to be considered in this case are " enjoyed by the public as of right," for there is no suggestion that, if so enjoyed, it has not been so enjoyed without interruption for a full period of twenty years, nor was there any evidence that there was no intention during that period to dedicate the way or otherwise to qualify the assumption of dedication under sect. 1 (1). However, the county court judge has come to the conclusion, on a consideration of all the evidence, that he is not satisfied that this footpath was a public right of way. He does not think that there has been any proof of user by the public as of right, and he thinks that the fact that:

> a few hawkers, people who had something to sell, a gipsy or two and the girl fetching the milk were allowed to cross the farm, is evidence which falls short of that kind of evidence required by the Act.

In another place he says:

> What is proved in substance is a mere trickle of user of this path.

Before the passing of the 1932 Act, when dedication had to be either proved or inferred, the mere proof of long, continuous and uninterrupted user of the way by the public, though it was evidence from which dedication might be inferred, did not create a presumption of right in favour of dedication. It was always a question for the tribunal of fact: *Folkestone Corporation* v. *Brockman* (1). In my view, the question of whether there has been such an actual enjoyment by the public as of right as would raise a presumption of dedication under the 1932 Act is equally a question of fact. The first difficulty which arises in the present case, to my mind, is that the county court judge has told us that he believes the witnesses but, nevertheless, in effect, limits his acceptance of their evidence to that part of their testimony which deposes that a limited number of persons, as described by him in his judgment, was allowed to pass across the farm. Had he indicated his acceptance of such a part of the evidence and his rejection of the rest, so as to accord with the evidence of the witnesses as a whole, this difficulty might have been removed, but I can find no indication in his judgment of any such intention, and certain indications to the contrary.

The evidence for the defendant, for the most part, consisted of testimony of past owners or occupiers of this farm or adjoining farms, most of whom spoke both of their actual experience and of the reputation of this path as a public one for very many years, and of evidence of persons living in the neighbourhood. As to the first class, Mr. George Foster, who was a farming tenant of Hope Farm for 17 years before Dec., 1934, says that the path was often used by strangers to him, and that tradespeople took a short cut over the path, and that sometimes people on a summer's evening would take a walk down there. He also says that he would not have allowed it if he had thought that he could have stopped it, and that for that reason he never did attempt to stop any people walking there. His wife, the owner of the farm from 1917 onwards, says that she thought that there was a right of way through the gate of the farm, and that she let anyone go through who wished, but would have liked to stop them. Mr. William Reeve, who lived at Hope Farm from 1911 to 1916, also deposed that strangers used the path, and that people used to take their Sunday evening walks there, and that he did not stop them because he always understood that it was a right of way. In his view, they had very definitely a public right of way, and everyone in the parish of Beckley had a right through there.

Next as to persons not owners or occupiers. Mr. Denis, who from boyhood lived at Beckley and its environs until 1924, and who was at one time employed at the adjoining Methersham Farm, speaking to its reputation, says that his people always told him that it was a public footpath, and that he used it as such himself. He had seen strangers many times, as well as hawkers, and he said that the path was gravelled to make it fit for winter use, and that it had stiles at its further end into a road known as Methersham Lane. There were many other witnesses, one being an old gentleman called Larking, 76 years old, who deposed that he had seen plenty of people go through it—in his words, "any amount of strangers." So also to the life effect spoke Mr. Frederick Butler, Mr. Golding and others. In a separate class, perhaps, may be put Mr. Thomas Paine, the postman, who has lived at Beckley all his life, having been first a relief postman 39 years ago, and then a permanent one since 1903. He states that he went through on the path a few times when he was on relief duty. He was required to go that way again later, and used to go through there sometimes, but, as he had a bicycle, he often went another way. In 1928, however, when he went back to that particular round, he used the footpath on his duty, and pushed his bicycle along there sometimes. In connection with this witness's evidence, it is curious to observe that the county court judge in terms says that "If you find, for example, a postman habitually going across the path when he had not got letters for Hope Farm, that would be evidence of user by the public." This is precisely what Mr. Paine says he did, and nowhere has the judge told us that he does not accept the evidence of Mr. Paine, the postman. Indeed, as I have stated, he appears to say that he accepts the evidence of all the witnesses. It is also significant to observe that Mr. Paine, though cross-examined as to the compilation of a map, was not cross-examined on this matter. The language of the judge in more than one place seems to indicate that he considered that the question of whether the people who used the path constituted the public was a distinct question from that of whether they used it as of right. The statement I have quoted about the postman is one example. On this point, I cannot well see how even the very limited class which he has found to have used the path, such as hawkers, people who had something to sell, gipsies or girls fetching the milk—he ignores the evidence of Mrs. Bull that children used it to come from school—did not sufficiently constitute the public to satisfy the Act. They certainly were not a class of persons seeking to assert any private right. The real A gist of this case, however, turns upon the finding that such persons did not, in the judge's view, whether or not they were to be taken to be the public, use this path as of right. The expression "as of right" as applied to a public way was considered by TOMLIN, J., in *Hue* v. *Whiteley* (2), at p. 445, where he defines user as of right as meaning that B the users were :

> believing themselves to be exercising a public right to pass from one highway to another.

I think that this is the proper meaning to be attributed to the words in the 1932 Act, and I would further apply to them the language of C COTTON, L.J., in *De la Warr* (*Earl*) v. *Miles* (3) at p. 596, quoted by HILBERY, J., in the *Merstham Manor* case (4), at p. 83 :

> Acts have been done as of right, that is to say, not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done.

D In this case, there is no suggestion of violence or secrecy, and such evidence of the owners as I have quoted points in only one direction—namely, that they did not object to allowing the public to pass because they all thought that it was a public right of way, and that, if they had not thought so, they would have objected. In these circumstances, I E cannot understand the county court judge when, having apparently accepted this evidence, he comes to the conclusion that the limited class of which he speaks was merely allowed to cross the farm on sufferance. That is to say, as I understand his finding, they passed, not as of right, but by consent, which is directly contradicted by the evidence, F which he nowhere suggests that he does not believe.

I agree with Mr. Evershed's contention that the existence or otherwise of user by the public under the 1932 Act as of right is, like the fact or inference of dedication itself, a question for the tribunal of fact, but I am unable in the present case to come to the conclusion that the county G court judge has properly directed his mind to the problem, nor do I think, if he believes the evidence, that there was any evidence before him from which he could infer that the passage of people he found to have used the path was merely by consent. It was really no part of the plaintiff's case that the user of the path was by consent, for Mr. Howse, H who alone speaks as to this matter for the plaintiff, simply states that there was no user by the public at all and that he did not think that there was a public footpath, while, as I have said, the plaintiff's evidence, which apparently is accepted by the county court judge, as to both observation and reputation, is all the other way.

Finally, I am by no means satisfied with the use which the county court judge made of the maps, and the inferences he drew therefrom. He says that the fact that the path is not claimed at all in the list prepared by the public authority is " pretty conclusive ". This is incorrect. Mr. Wain, the town-planning officer to the Battle Rural District Council, says that the official map does show a right of way across Hope Farm, and, though the southern part of this path on the map beyond Hope Farm is the path said by the judge to have been abandoned, and deviates beyond Hope Farm from that path which alone, he says, is sought to be established in this case, the path, so far as it is on the plaintiff's property, is shown both on the parish map and on the rural district authority's map. The judge is also mistaken in saying that by the Act of Parliament " it is the duty to report all footpaths." No reference to any statute imposing such an obligation appears in the case, nor was our attention drawn to any such statute. The only reference to maps which can be found in the Act of 1932 is in sect. 1 (4) (*a*), which gives to the owner of land liberty to deposit with, among other local authorities, the council of the county and the council of the rural district a map of a certain scale, and a statement indicating what ways he admits to have been dedicated as highways. Thus, since the judge has regarded the absence of this particular path on the map as claimed as " pretty conclusive " (although in fact, as I have said, at the relevant place on Hope Farm it is there), this supposed statutory obligation must be taken to have weighed conclusively with him in his final judgment.

As, in my opinion, for the reasons I have endeavoured to state, there should be a new trial in this case, I do not propose to review the evidence which had relation to the compilation of the parish and rural district maps relating to footpaths. The judge erroneously mentions as a point, as he says :

> very nearly clinching the case in favour of the plaintiff, the fact that the path is not claimed at all in the map prepared by the local authority.

If the judge, looking at the map, as he was entitled to do, on the question of reputation, was in error when he thought that the critical path was not on the map of the local authorities, it is another reason why this trial is unsatisfactory, for his conclusions, which he says are almost concluded or clinched by the absence of the path on the map, are to be contrasted with his statement that there is nothing in the evidence which can clinch the matter in favour of the defendant. This remark, unaccompanied by any criticism of the evidence given for the defendant as such, compels me to the view that his ultimate finding of fact is one based either upon no evidence or upon erroneous estimation of the evidence, and so cannot be supported in law. I would add that I have read the judgment of Scott, L.J., and that I agree with his further observations, that the claim to the southern path in fact was never abandoned, and the judge failed to consider the effect of the evidence as to the alternative deviation west of Hope Farm.

For these reasons, bearing in mind that the matter properly to be considered is entirely one for the tribunal of fact, I find, nevertheless, in this case that such facts have not properly been determined, and that consequently there must be a new trial. As I have said, I am not sufficiently clear that the defendant ever abandoned his claim to the right of way depending upon a continuation of the path along the southern route beyond Hope Farm shown by the maps, and proof, therefore, of this matter, and all other relevant evidence, should be open to the appellant, if he still desires to maintain that the southern route marked upon the maps is an alternative or additional right of way. The plaintiff is also, of course, to be at liberty to call such evidence as he may think fit. The costs of this appeal are to be the appellant's, and the costs of the first hearing are to abide the decision in the second.

SCOTT, L.J.: This is an appeal from a judgment dated June 15, 1937, of His Honour JUDGE ARCHER, K.C., sitting in the Hastings County Court. The plaintiff is the owner and occupier of a small property, consisting of a house and three acres of land, called Hope Farm, in the parish of Beckley in the county of Kent. The house abuts on Bellhurst Lane, which, on the evidence, is a private road to Great Bellhurst Farm, a little to the north. The action was brought by the plaintiff against the defendant for trespassing upon her property by walking over it along a track or way which runs across the property in an east-and-west direction. The defendant pleaded that he was upon the track as a member of the public in exercise of a public right of way, the length within the plaintiff's land being an intermediate link in a long public footpath connecting comparatively distant highways to the west and the east. Thus, the only issue for trial was whether or not this track was a public footpath, and upon this issue it did not matter whether both or only one of the western branches was established. Either of them would suffice. The judge held that the defendant had not proved his case, and gave the plaintiff £5 damages and an injunction.

I have had the privilege of reading the judgments of SLESSER, L.J., and FARWELL, J. The former is of opinion that we should order a new trial. The latter thinks that the issue was so much one of fact that we cannot interfere. The trial seems to me to be so unsatisfactory as a whole that injustice has been done. I think that the judge failed to have in mind during the trial what the real issue before him was; misdirected himself upon the new Act, and its bearing upon what the defendant had to prove; misunderstood the evidence, although, if followed in the light of the information contained in the various maps, it was clear, and, on the crucial question of the piece of path across the plaintiff's property, was substantially all one way. In the result, he failed to address himself to the vital points both of law and of proof. It follows that in my view the least we can do is to order a new trial. For reasons which I will state presently, I should have been willing to go further, and to enter judgment for the defendant, on the ground that the evidence was conclusive in his favour, with no evidence the other way. However, in view of the judgment of Slesser, L.J., I agree in the course that he proposes.

Before discussing the evidence and judgment below, I want to consider what the law now is since the passing of the Rights of Way Act, 1932, which the judge had to apply. The new Act, as stated in its long title, was an amending Act. Before the Act, the law applicable was the common law. The main alteration is effected by sect. 1, which gives a new statutory effect to mere proof of actual user as of right and without interruption. At the time of the passing of the Act, the main outline of the law affecting proof of a public highway, whether a carriage-road, a bridle-path or a footpath, had been drawn quite clearly by judicial decisions. Whereas in Scotland proof of 40 years' user as of right, and without interruption in the enjoyment of the right, *ipso facto* established the legal conclusion that the way was public by prescription, in England no such convenient rule of law had been evolved by our courts. Our legal theory had always been—at any rate within the last century or two—that the sole origin of a public highway was dedication to the public use by the owners of the land over which it ran, and in consequence that, in case of dispute, the public right could be established only by such evidence as would justify an inference of fact that the way had at some date, known or unknown, been so dedicated. The corollary followed that, on this as on all other issues of fact, the tribunal had to decide, once there was some affirmative evidence before it of user, whether or not on balance it was sufficient to establish dedication. That decision if given by a High Court judge sitting alone, was open to revision by a Court of Appeal, but not if given by a county court or other court, whose decision on fact was made final by statute. Whichever jurisdictional mode of deciding questions of fact happened to have been invoked in the particular case, the task of the tribunal of fact was not limited to deciding the necessary questions of user—Was it of right ? Was the exercise of the right interrupted ? How long had it continued ? These findings would in Scotland have sufficed for the decision of the legal issue. In England, however, the tribunal had to deal with such difficult investigations as the state of the title of the owners and whether there was an owner who could dedicate, and consequently sometimes even the time when the dedication—usually quite imaginary—had in fact taken place. Above all the other difficulties, the tribunal had solemnly to infer as an actual fact that somebody or other had in fact dedicated. It was often a pure legal fiction, and yet put on the affirmant of the public right an artificial onus which was often fatal to his success. The practical result of the English rule of law was that in many cases, although quite a formidable body of evidence was available to demonstrate what I will call the Scottish premises, the public claimant failed on the additional English requisites. I infer from its terms that the Rights of Way Act, 1932, was passed for the definite purpose of getting rid of these extra difficulties of proof, and of assimilating our English legal position to the more sensible one obtaining north of the Tweed. Subject to one doubt, to which I will recur, I think that Parliament has done it. After reading the judgment below several times, I have come to the conclusion that the judge has failed to give any effect at A all to this change of the law.

In construing the Act, we should, of course, proceed upon the ordinary principle of statute interpretation, and should begin by asking what the words mean in their natural English sense. Omitting words of limitation and exception, sect. 1 (1) says:

> B Where a way . . . upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway.

Subsect. (2) says that after 40 years of such user the legal inference shall be conclusive, and subsect. (6) makes the 20-year and 40-year C periods run back, in cases like the present, from the date of the dispute —whether of the claim or of the trial does not matter for this appeal. There is only one way in which the public can enjoy a footway, and that is by walking over it, and this is the meaning of the short word “ user ” in all the cases about footpaths. Members of the public enjoy it “ as D of right,” when, as Tomlin, J., said, in *Hue* v. *Whiteley* (2), at p. 445, they use it:

> believing themselves to be exercising a public right to pass from one highway to another.

This seems to me the simplest and truest interpretation of the three words E “ as of right,” as applied to public rights of way. It is doubtless correct to say that negatively they import the absence of any of the three characteristics of compulsion, secrecy, or licence—“ *nec vi, nec clam, nec precario*,” phraseology borrowed from the law of easements—but the statute does not put on the party asserting the public right the onus of F proving those negatives, and I do not think that Parliament borrowed the words “ as of right ” from the law of easements, as the judge thought. It chose them because all through the decided cases upon public rights of way they had been judicially used, and in the sense stated by Tomlin, J. Nor do I think that Hilbery, J., in the only reported case upon the G 1932 Act, *Merstham Manor, Ltd.* v. *Coulsdon & Purley Urban District Council* (4), really meant to say anything different from what Tomlin, J., had said, when, at pp. 82, 83, he quoted Brett, L.J., in *De la Warr (Earl)* v. *Miles* (3) (at p. 591):

> “ The true interpretation of those words ‘ as of right ’ seems to me to be that he H has done so upon a claim to do it, as having a right to do it without the lord’s permission, and that he has so done it without that permission. . .” It is the requisite quality of the act, not merely the act itself, which is here defined. . . . The essential quality of the acts—that is, as acts done as of right—has from early days in our law been established by showing that the acts were done openly. . . . I think it right, therefore, to hold that, where the words “ as of right ” are used in the Rights of Way Act, 1932, in connection with actual enjoyment, they are satisfied if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given.

These passages, I am sure, were not intended to put on the members of the public proving " enjoyment as of right " the onus of disproving these negatives, but I cite them because I believe that the county court judge thought that they were.

The next requirement of the statute, " without interruption," means that the *enjoyment* of the right must not have been interrupted. If for the statutory period members of the public have used the way as of right, and their exercise of that right has in fact not been interrupted, then the statutory consequence follows. The word " interruption " must be given its proper import in its grammatical context. A mere absence of continuity in the *de facto* user proved will not prevent the statute from running. If that were not so, the necessary proof in public right-of-way cases would often break down—especially in the 40-years period—simply because witnesses were not available to fill all the gaps in such proof. No interruption comes within the statute unless it is shown to have been an interference with the enjoyment of the right of passage. The change of the law is that, upon proof of such user for 20 or 40 years, the conclusion of dedication follows as a presumption *juris et de jure,* instead of as an inference of fact to be drawn by the tribunal of fact. The phrase of the Act " shall be deemed to have been dedicated " is merely an historical periphrasis for saying that the way thereupon by operation of law becomes a highway.

There is, I think, no doubt about the following propositions of law : (i) a way once dedicated to the public is a public way for ever (apart from subsequent statutory proceedings to close it) ; (ii) once the inference of past dedication has been established to the satisfaction of the competent tribunal of fact, the decision is permanent ; (iii) the decision is *res judicata inter partes*, and, if the public have been properly represented in the proceedings, for example, by the Attorney-General, it has the effect of a judgment *in rem* binding on all the world ; (iv) the words " shall be deemed " import a legal consequence upon proof of the statutory requisites ; (v) the tribunal of fact has thus under the Act no longer any function to perform in regard to the inference of dedication. On this interpretation, the Act has got rid of all the trouble and difficulty inherent in the task of inducing the tribunal of fact to give a solemn finding of an act of dedication at some past date, which was, as a rule, wholly imaginary, and often by an imaginary owner. At least, this is my view of the intention of the Act. There is a possible ambiguity in its express provisions, which the evidence in the present case and the judgment make relevant to this appeal. The judge has held that there was no reason for any of the owners of Hope Farm between 1895 and 1937 to dedicate the 100 yds. of track in question. That was one of his grounds for rejecting the whole of the remarkably strong evidence for the defence, although he expressly said that he believed the witnesses, and that he thought that their evidence was honestly given. For reasons which I shall give presently, I think that the judge was in error ; but, to bring out the point of interpretation, let me accept the hypothesis of no dedication during either the 40-year or the 20-year period. Even so, there may have been dedication before 1897, and in that case it would necessarily follow that there could not be any " intention to dedicate " after that date. An owner cannot dedicate twice. How, in such a case, is sect. 1 to be read and applied ? If the subsections are to be read as limited to the named period, their operation seems to be excluded by their own proviso, " unless there is sufficient evidence that there was no intention to dedicate during that period."

Are we to construe the Act as leaving the old common law burden of proving dedication upon the affirmant of the public right of way where " user of right without interruption " is proved, extending back to pre-40-year times, whilst it relieves him of it in the 40-year and 20-year periods ? It would be a strange *casus omissus*, and I cannot think that it was the intention of Parliament to leave it. The simplest way of avoiding so absurd a result is either to construe the word " full " in each subsection as meaning " at least," or, after the word " years," to imply in subsect. (1) the words " but less than 40 years," and in subsect. (2) the words " or more." This is the interpretation of Slesser, L.J., and I agree with it. It makes statutory user during not less than 20 years *prima facie* ground, and, where it is proved for 40 years or more, conclusive ground, for the statutory inference, without any obligation upon the affirmant to prove dedication during the pre-40-year period, and in subsect. (2) cases it brings the law of England into harmony with the law of Scotland. The provision in sect. 5 that " this Act shall not apply to Scotland " would naturally follow in the legislative scheme. That this was the intention of the Act is, I think, beyond doubt. Its main object was obviously to get rid of the onerous fiction of proving an actual dedication which had been imposed by a long series of English decisions, culminating in *Folkestone Corporation* v. *Brockman* (1), which was the essential difference between English and Scottish law, as was pointed out by Lord Kinnear, reiterating what Lord Watson had said in *Mann* v. *Brodie* (5), at pp. 390, 391. For the purpose of the present case, it is not necessary to consider what difference is made in subsect. (1) —the 20-year clause—by the omission of the word " conclusively " which appears in subsect. (2)—the 40-year clause—as the evidence of user covered the 40-year period.

If what I have said is correct, the Act applies to all future disputes after Jan. 1, 1934, when the Act came into force, and there is no longer a common law procedure for establishing the public right outside the statute. I mention this because the judge was, I believe, still thinking in terms of the common law, and addressing his mind to the question of dedication during, as well as before, the statutory periods as the primary issue of pure fact he had to decide, as if user was just relevant evidence from which to infer dedication, but raising no inference of law without a preliminary adjudication of fact by him on the issue of dedication.

He seems to have thought himself fortified in this opinion by the decision of HILBERY, J., in the case of *Merstham Manor, Ltd.* v. *Coulsdon and Purley Urban District Council* (4), where the defence was expressly stated alternatively under the statute and at common law. This was, I think, merely a mistake of the pleader.

The tribunal of fact is still left with a definite and important function on the issue of user. Even under the new law, it is under no compulsion to accept the evidence of user. It may still say it is not satisfied with it, if it honestly doubts its sufficiency in credit, or volume, or length of time, or because of circumstances indicating that the enjoyment was not " as of right "—for example, by licence—or was interrupted. Where these causes of doubt are absent, however, it *ought* to find the fact of user as of right, as Parliament contemplated it would, although its decision, when given, cannot be upset unless there has been error of law, as, for instance, if there was not " evidence before them upon which reasonable men might act to sustain their findings of fact " (see per LORD ATKINSON in the *Folkestone* case (1), at p. 367).

I will now add a few words about those terms of subsect. (1) to which I have not yet referred. The passage in the first three lines calls for no comment, as it is irrelevant to any question in the present case. It concerns chiefly the sort of position to which sect. 1 (7) is directed. Similarly, the last proviso to subsect. (1) has, for two reasons, no relevance here. The first is that it does not reappear in subsect. (2), and that the evidence in the present case, if sufficient at all, was such as to establish statutory user for the 40-year period, and indeed for an indefinitely longer period also. Whether it was established in the sense that we can enter judgment or only to the extent to make it proper to order a new trial, I leave open, for the moment. The other reason is that there was no evidence below that the various freeholders in possession of Hope Farm for more than 40 years were not capable of dedicating the way.

At the trial, the onus being on the defendant, he was called on to begin, and it is well to consider what he had to prove. A public footpath in ordinary agricultural country must have a public entrance and a public exit. There was no public highway near the plaintiff's property, either to the east or to the west, as I will show presently. The defendant had therefore to show that the piece of path over the plaintiff's land was just a stage of a longer path which extended both eastward and westward until it finally emerged at each end in an ordinary public highway. In this sense the whole of the alleged footpath was directly in issue, although a decision that the defendant was upon the plaintiff's land in exercise of a public right of way, and therefore not trespassing, would only operate as a judgment *inter partes*, and would not establish the whole footpath as if there had been a High Court decision in a properly constituted action by the Attorney-General. None the less, the case is one of great practical importance, because private people and even parish and district councils shrink from the cost and risk of a relator

action. Secondly, in practice, the limited decision in a trespass action after a full investigation is usually accepted by the countryside. Thirdly, in the present case, in my opinion, user as required by sect. 1 of the 1932 Act over the whole length of the defendant's line of path, including both its western branches, was as well established as can ever be expected
A in such cases. It is for these considerations that I have felt bound to analyse the whole of the evidence which was before the judge, and to deal with some of it rather fully. If, on such proof as there was here, a footpath cannot be pronounced public, I despair of the future of most of our unregistered public paths, of which there are still very many.
B By "unregistered" I mean those not yet officially recorded by the local authority or owners. In these days, when motor buses, motor cars and motor cycles transport so many into the countryside both for business and for pleasure, and when practically all agricultural workers, and indeed most of the rural population, have their bicycles, long footpaths,
C which 50 years ago meant so much for ease of communication, are infinitely less frequented, and it becomes easier and easier for real public rights of way to disappear, just because they become unprovable. Yet the rambler—sometimes called the "hiker"—needs the footpath more than ever. The movement represented by the ramblers' societies is of
D national importance, and to the real lover of the country, who knows that to see it properly he must go on foot, but who is driven off all main roads and a good many others by the din and bustle of motor traffic, the footpath is everything. In short, it is of real public moment that no genuine public footpath should be lost, without statutory action
E to close it.

I suspect that the defendant's zeal for establishing the more northern of his two branches rather than the southern, about which apparently there was no difficulty of proof, may have been due to some such sentiment for the public good. Whatever the motive, however, it is plain
F that he was intent on establishing it as a public footpath, and it was this part of his case which evoked the only appearance of conflict of proof in the whole action, because it led to counsel for the plaintiff very properly putting to the defendant and his witnesses in cross-examination the facts that the parish and district councils had in the years 1934-1936
G had maps of the footpaths of the parish and district prepared, and that these maps did not show his northern branch at all.

For reasons which I will explain later, I do not think that the judge's judgment, even on this northern branch of the path, can stand. The appellant is, in my view, entitled to a new trial even on that part of
H the case. The astonishing thing is that the judge, whilst relying on these official maps as conclusive against the existence of the northern footpath, nevertheless ignored their evidence, which was at least equally conclusive, that the whole of the defendant's southern branch, and the whole of his path east of the plaintiff's property and extending to the Peasmarsh high road, and the whole of the intervening piece over the plaintiff's

land and the land of Hope Cottage, was in each map shown as a public footpath. On this part of the case I have not found any evidence the other way, and the consequence of the acceptance by the local authorities of this path, with nothing to suggest any mistake upon their part, and no evidence the other way, would, in my view, have justified judgment for the defendant. [His Lordship then reviewed the evidence.]

Farwell, J.: This is an appeal from the decision of the county court judge, sitting at Hastings in the county of Sussex. The defendant in the action is the appellant. The plaintiff has recently become, and is now, the owner of a house known as Hope Farm, and some three acres of land. The house had been, for many years prior to her purchase, used as a farm, and was occupied by persons farming the land acquired by the plaintiff, together with other lands adjoining. The defendant is a farmer living in the neighbourhood. The plaintiff in the action claims damages and an injunction for trespass by the defendant on her land, the alleged trespass consisting of the user by the defendant of a footpath across the property. In the first instance, the only defence set up by the defendant was that the footpath was a public right of way, and that, therefore, in using it he was not trespassing. In the course of the trial, however, he applied for, and obtained, leave to set up an alternative plea that he had a private right of way over the path.

The county court judge decided against the defendant on both those issues, and there is no appeal against his decision so far as he decided that the defendant had not established a private right of way, but the appellant claims that the judge was wrong in holding that there is no public right of way.

In the view which I take of this case, it is unnecessary to refer to the evidence adduced at the trial, beyond stating that the ownership of the plaintiff in the soil of the disputed way was proved, and that the defendant called some dozen witnesses, whose evidence was that for many years they had used the footpath openly on various occasions, that they had seen other people, some of whom were strangers to them, using it from time to time, that they had never been stopped from using it or seen other people stopped, and that they had used it in the belief that they were entitled to use it as a public right of way. That evidence as a whole covered a period of more than 20 years. The plaintiff called one witness on this issue, who said that he had never heard of the alleged right of way. The judge expressly stated in his judgment that the witnesses were honest and that he accepted their evidence. I should add to this short summary of the evidence that the plaintiff did not dispute that there might have been dedication to the public of the way during the preceding 20 years, and, further, I should say that I am assuming, for the purpose of this judgment, that it was proved that the footpath in dispute formed part of a much longer path over other land, which led ultimately to and from an admitted public highway.

In my judgment, the only issue in the action was whether the existence of the alleged public right of way had been established, and that was wholly a question of fact. At the hearing of this appeal, there was a discussion as to the effect of the Rights of Way Act, 1932, and it is perhaps right that I should state my views shortly upon it. Prior to the Act, it was extremely doubtful whether a public right of way could be acquired by prescription, and, generally speaking, it is true to say that the only way in which a public right of way could be created, apart from express creation by statute, was by dedication by the owner of the soil. Such dedication could be either express or implied, and the necessary implication would be made in a case where the court was satisfied that there had been at some material times a person or persons capable of dedication, and that the evidence of user by the public led inevitably to the conclusion that there must have been such dedication. In my judgment, notwithstanding the Act of 1932, it is still true to say that, apart from statute, dedication is the only way by which a public right of way can be created. It is still possible to prove the existence of such a right by express grant or by implication where the user is less than 20 years, but, where the user is for 20 years or more, no implication is necessary, because in that event sect. 1 of the Act provides that there shall be deemed to have been dedication if during that period dedication would have been possible. The Act, however, in no way relieves the person asserting the public right of way from proving such right. Indeed, the section expressly provides that dedication can only be deemed to have been made where there has been user by the public openly and as of right for 20 years or more, and it is a question of fact in each case whether or not the right has been proved.

The expression "as of right," which is to be found in sect. 1 of the Act of 1932, corresponds with the words claiming right in the Prescription Act, 1832, and, in my judgment, bears the same meaning. These words have been explained in several cases, and I understand them to mean that the user must have been by persons who honestly believed that they had a legal right so to do, as distinguished from user by persons who thought they had the express or tacit licence of the owner, or were regardless of the rights of such owner. That being so, the evidence of persons who used the way that they have seen others, unknown to them, using it is some evidence of actual user, but it is not necessarily of great weight, because it is impossible to say whether or not the user of such persons was "as of right." Further, it must be remembered that, even if user for more than 20 years, by members of the public who honestly believed that they were entitled to use the way, is established, it is by no means conclusive of the issue whether the alleged right has been proved. That must depend on a variety of matters which must be taken into consideration—for instance, the locality, the nature of the user and its quantity, reputation, the terminus at each end, and other similar matters. All these are questions of fact, as is the ultimate conclusion to be drawn from them—namely, whether or not the public right has been proved. This being so, if the action is tried in a county court, the decision of the judge is final, and not open to revision in this court : *Folkestone Corporation* v. *Brockman* (1). It was argued in the present case that, notwithstanding that decision, it was open to this court either to reverse the decision of the county court judge or to set aside the judgment and order a new trial. In support of the first contention, it was said that there was no evidence to support the finding. I am wholly unable to understand what is meant by that in a case of this kind, where the onus is wholly on the person who asserts the right, if, as is the case here, the ownership of the soil is proved to be in the other party. It was for the defendant here to prove his case, if he could. The judge has held that the evidence adduced by him was insufficient, and, that being so, the contention that the finding was wrong because there was no evidence to support it appears to me to be an impossible one, and I need say no more about it.

In support of the contention that it is open to this court to grant a new trial, it is contended that the trial was unsatisfactory, and that therefore the defendant should be given another opportunity to prove what he has hitherto failed to prove. It is not suggested that the trial was unsatisfactory on the ground that the county court judge wrongly admitted or excluded evidence, or any other like ground, but, as I understand the argument, on the ground that, from a careful perusal of the judgment, it will appear that the judge has failed to give sufficient weight to certain parts of the evidence, and has given too much weight to other parts of it. Again, I feel a difficulty in appreciating the contention. If the court is to adopt the course suggested, it will necessarily involve a review by the court of the judgment, and a decision that, if it is not wrong, it is at least open to so much doubt that it should be set aside, and a new trial ordered. It appears to me that this must be so, since it is impossible to suppose that this court would order a new trial if it saw no reason to think that the decision was wrong. This court, therefore, is being invited to consider a finding which is wholly one of fact, and to decide whether or not there is so much reason to doubt its correctness as to justify a new trial. That course does not appear to me to be open to this court in the light of the decision in the *Folkestone* case (1). The county court judge is the sole judge of fact, and this court cannot properly disturb his finding, either by reversing the decision or by setting it aside and ordering a new trial, because the court might have come to a different conclusion on the evidence.

In this judgment, I have purposely refrained from expressing any opinion at all as to the correctness or otherwise of the judgment appealed against, but I should say that, in my view, the conclusion to which the county court judge came was one to which it was open to him to come on the evidence adduced before him, whether such conclusion was right or wrong. For these reasons, in my judgment, this appeal fails, and should be dismissed with costs.

Appeal allowed and new trial ordered. Leave to appeal to House of Lords granted.

Solicitors: *Skelton & Rust*, agents for *Charles W. Buckwell*, Battle (for the appellant); *Blyth, Dutton, Hartley & Blyth*, agents for *Menneer, Idle, Brackett & Williams*, St. Leonards-on-Sea (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

BANCO DE BILBAO *v.* REY. BANCO DE BILBAO *v.* SANCHA.

[COURT OF APPEAL (Greer, MacKinnon and Clauson, L.JJ.), **February 22, 23, 24, 25, 28, March 17, 1938.**]

Companies—Foreign companies—Spanish bank with branch in London—City of domicil captured by insurgents—Reputed change of bank's board—Dismissal of London managers—Decrees of de jure and de facto governments.

The plaintiff bank, a Spanish company domiciled at Bilbao, had a London branch which was managed by the defendants. On Oct. 6, 1936, the Basque country was constituted an autonomous region, and on Dec. 23, 1936, the Basque government issued a decree amending the constitution of Basque banks, under which decree the Minister of Treasury constituted a new board, which on Jan. 5, 1937, took over the control of the bank. The new board sent one A. to London to take over the control of that branch, but the defendants refused to give up control. The plaintiff bank thereupon started an action to restrain the defendants from continuing in control. On June 4, 1937, it was held that the Basque government decrees were ineffective, so that the new board had no right to represent the bank. On June 10, 1937, the plaintiff bank entered notice of appeal. By this time the insurgent forces were threatening Bilbao, and on June 15, 1937, the board removed the bank's documents from Bilbao, which was occupied by General Franco on June 19, 1937. It was proved that His Majesty's government recognised General Franco's government as being *de facto* in control of Bilbao, but also recognised the Spanish republican government as being the *de jure* government of the whole of Spain. On Aug. 22, 1937, the republican government issued a decree to the effect that the domicil of all companies in the Basque country should be deemed to be transferred to Valencia or Barcelona. On Sept. 30, 1937, the republican government issued a decree purporting to validate retrospectively the decrees of the Basque government which had been found in this action to be invalid. This decree was confirmed by the Cortes. On Dec. 29, 1937, the insurgent government issued a decree, which was to operate as from July 18, 1936, and purported to nullify both any change made in the domicil of a company since that date and any proceedings of the republican government directed against the bank:—

HELD: (i) the interpretation of the bank's articles, in order to decide what body of directors had the legal right of representing it, must be governed by the *lex loci contractus*—in the present case, Bilbao.

(ii) the court was bound to acknowledge the acts of the government which His Majesty's government recognised as the *de facto* government of the area in question.

(iii) conversely, the acts of the rival *de jure* government of the same area must be treated as a nullity.

(iv) in the present case, therefore, the legislation of the republican government during the material period must be disregarded.

(v) the correct procedure, in a case where the defendant denied that the action was being brought by the person or corporation named as plaintiff, was to apply to the court for the action to be struck out or stayed. If such an application was successful, the court would order the costs to be paid by the solicitor who had wrongly represented to the court that he was instructed by the person named as plaintiff.

[EDITORIAL NOTE. The present position of European affairs gives this case particular importance. It reaffirms the principal that a *de facto* government recognised by the government of this country is the proper authority to pass enactments and make decrees in so far as its area of recognition is concerned, and applies that principle to the somewhat complicated events that occurred in the Basque territory.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 5, pp. 868-870, paras. 1509-1512; and for Cases, see DIGEST, Vol. 10, pp. 1204-1206, Nos. 8523-8534.]

Cases referred to:

(1) *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; Digest Supp.; 93 L.J.K.B. 1098; 132 L.T. 99.

(2) *Richmond* v. *Branson & Son*, [1914] 1 Ch. 968; 33 Digest 236, *1526*; 83 L.J.Ch. 749; 110 L.T. 763.

(3) *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor (James) & Co.*, [1921] 3 K.B. 532; 11 Digest 536, *387*; 90 L.J.K.B. 1202; 125 L.T. 705.

(4) *White, Child & Beney, Ltd.* v. *Simmons, White, Child & Beney, Ltd.* v. *Eagle Star & British Dominions Insurance Co.* (1922), 127 L.T. 571; Digest Supp.

(5) *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*, [1937] Ch. 513; [1937] 3 All E.R. 8; Digest Supp.; 106 L.J.Ch. 279; 157 L.T. 428.

Appeal from two judgments of Lewis, J., dated June 4, 1937. The facts of the cases are fully set out in the judgment.

A. T. Miller, K.C., and *S. K. de Ferrars* for the appellants.

Sir Patrick Hastings, K.C., *Valentine Holmes* and *Helenus Milmo* for the respondents.

Clauson, L.J.: This is an appeal from the judgments of Lewis, J., in two actions in each of which the Banco de Bilbao is plaintiff, one Sancha being the defendant in one action and one Rey being defendant in the other. On June 4, 1937, the judge gave judgment in each action for the defendant, and from those judgments the plaintiffs, the Banco de Bilbao, appeal to this court.

Little or no argument has been addressed to this court by the appellant in criticism of the reasoning or conclusions of the judge. The many days spent in argument have been directed almost entirely to a consideration of the legal effect of the various occurrences which have taken place since the date of the judgments in the action. The plaintiff, the Banco de Bilbao, is a company constituted under the laws of Spain, with its *domicilio social* or corporate home at Bilbao. For many years it has maintained a branch in London, which, until the occurrences next to be related, was carried on by the defendants as managers. Until the beginning of 1937, the affairs of the bank at its corporate home in Bilbao were conducted by a board of directors, duly elected by the shareholders in accordance with the articles regulating the bank. It appears, however, that, on Oct. 3, 1936, the president of the Spanish republic issued a decree, having the effect of law, directing the formation in all private banks (including, as it would appear, the Banco de Bilbao) of a directing committee consisting of a representative of the Treasury, a representative of the shareholders, a representative of the holders of current accounts, and a representative of the National Federation of Banking, as well as of such directors as " have complied with the duty of affording collaboration to the regime." No direct action was, as it would seem, at this time taken by the Spanish government to reconstitute the board of the bank in accordance with this decree. On Oct. 6, 1936, however, a law came into force constituting the Basque country, in which Bilbao is situate, an autonomous region within the Spanish state. On Dec. 23, 1936, a decree of the government of the autonomous Basque state thus constituted was issued, amending the constitution of banks within their territory—which included the Banco de Bilbao—by substituting for each board of directors a board consisting of 12 persons, six to be selected by the Minister of Treasury from existing directors and shareholders, four to be appointed by the nomination of the trade unions of banking employees, and two others. On Jan. 5, 1937, the Ministry of Treasury by order constituted a new board, in accordance with the last-mentioned decree, for the Banco de Bilbao. From Jan. 5, 1937, the new board thus constituted took over control of the office of the bank in Bilbao.

The new board thus constituted was desirous of obtaining control of the London branch of the bank, and on Mar. 18, 1937, one Pedro Albisu presented himself at the London branch and produced to the defendants certain notarial documents which it was suggested had the effect of superseding the authorities under which the defendants had for many years acted as managers of the London branch, and of vesting in Albisu powers to represent the bank in London and to control the London branch. The defendants refused to hand over the branch to Albisu, and these actions were started on Mar. 22, 1937, with the object of restraining the defendants from continuing in control of the London branch and of the assets of the bank in London. In due course, arrangements were made for three issues to be settled, which were, in substance, whether Albisu was, at the date at which he presented himself at the London branch, or at the date of the commencement of the action, attorney of the bank, with power and authority to take charge of the London branch, and whether the respective defendants had like authority on the like dates. The issues came on for trial before Lewis, J., and the questions which emerged were (i) whether the notarial documents produced by Albisu were proper and sufficient evidence of Albisu's authority to act in London on behalf of the bank, and (ii) assuming that they were, whether as a matter of Spanish law the decrees of the

Basque government were valid to constitute the new board as the legal executive organ of the bank.

At the trial, the main controversy was directed to the second question, and LEWIS, J., held as a fact that, according to the law of Spain, and having regard in particular to certain provisions in the Spanish Constitution, the decrees of the Basque government were ineffective for their purpose, with the consequence that the board set up by the order of Jan. 5, 1937, had no legal right to act as the board of the company, and that Albisu, who admittedly derived his authority from the new board so set up, had accordingly no effective mandate from the company. On this ground, the judge decided the issues against the plaintiff bank, and on June 4, 1937, gave judgment for the defendants in the two actions. On the first question, the judge held that the notarial acts, which were the only evidence produced for the mandate to Albisu upon the existence of which the actions were founded, were sufficient evidence of a due delegation to Albisu from the new board of authority to act on behalf of the bank in London. In view of his finding on the question of Spanish law, however, the judge's finding on this point of evidence was, of course, of no assistance to the plaintiff bank.

It is necessary at this point to observe that the parties appear to have carried on the litigation in obliviousness of the principles laid down in the House of Lords in *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1), where their Lordships approved and adopted as good law the judgment of WARRINGTON, J., in *Richmond* v. *Branson & Son* (2). Those principles may be summarised for the present purpose as follows. Where the answer to an action consists of a denial by the defendant that the action is really the action of the person or corporation whose name appears as plaintiff, and an assertion that the action is really the action of a person or body claiming without legal justification to represent the named plaintiff, this answer cannot be set up as a defence in the action. This answer must be set up by taking steps to satisfy the court, before the action comes on for trial, that the truth is as the defendant alleges, and, if the defendant succeeds in so satisfying the court, the result will be, not that the defendant will succeed in defending the action, but that he will succeed in having the action struck out or stayed, the costs incurred being thrown, not on the nominal plaintiff whose name has been wrongfully used, but on the solicitor who has taken upon himself to represent to the court that he is retained by the proper organ of, or representative of, the plaintiff to urge the plaintiff's suit before the court. The principle having been laid down by the House of Lords, it is superfluous to justify it, but the inconveniences of disregarding the principle are well-illustrated by the present case. The disregard of the principle has resulted, as a matter of form, in the pronouncement of a judgment which technically appears to estop the plaintiff bank from setting up against its mere servants the defendants that the bank are, as they obviously must be, free as a matter of law to terminate at will their servants' agency. In this particular case, there is, of course, no fear of the present defendants ever setting up such a point, but it is most undesirable that the records of the court should be in such a form as to enable such a point to be plausibly set up. The fact is that, where, as in the present case, the defendants are mere servants A of their master, the bank, they can never have any just title to defend an action by their master, the bank, to enforce termination of their agency. The only case that the agent can possibly have must be, not that he has a defence to the action, but that the action is not the master's action at all, but the action of some one who poses as the master but B is not really the master.

With these observations, the account of the facts may be resumed. On June 10, 1937, the plaintiff bank appealed to this court against the judgments of LEWIS, J., and immediately afterwards events proceeded to develop with startling rapidity. The civil war in Spain had been C waging for many months, and the insurgent forces by this time seem to have been in occupation of a considerable portion of the Basque territory, and to have been threatening Bilbao. On June 15, 1937, the new board, whose sympathies were with the government, and not with the insurgents, left the office of the bank in Bilbao, and removed the bank's documents, D and so forth, away from the Basque territory—first to Santander, subsequently to Valencia, and ultimately to Barcelona. On June 19, 1937, Bilbao was occupied by the insurgent forces under General Franco, and it appears from a letter addressed to the solicitors in the case by the Foreign Office on Feb. 17, 1938, that the government set up by General E Franco in the Basque country since his capture of Bilbao on June 19, 1937, is now recognised by His Majesty's government as the government which exercises *de facto* administrative control over a considerable portion of the Basque country, including Bilbao. There appears to be no dispute that control has been so exercised at Bilbao since June 19, 1937, and over F the rest of the Basque province of Viscaya, in which Bilbao is situated, since about the end of Aug., 1937, while over most of the rest of the Basque country such control has been exercised since a period anterior to the capture of Bilbao by General Franco. It appears that, notwithstanding recognition by His Majesty's government of the *de facto* position G of General Franco's government in this area, His Majesty's government recognises the republican government of Spain as the *de jure* government of the whole of Spain, including the area in which it recognises General Franco's government as exercising *de facto* administrative control.

The new board having left Bilbao, the Spanish government, at a time H when it had no *de facto* control over Bilbao or the surrounding Basque country, set about the enactment of legislation dealing with such banks (including in particular the Banco de Bilbao) as had their corporate homes (*domicilio social*) in Bilbao. That legislation was as follows. On Aug. 22, 1937, the president of the Spanish republic issued a decree in Valencia to the effect that the registered office (*domicilio*) of all companies which had been established in the Basque country should be deemed to be transferred to the towns of Valencia or Barcelona, according as might be decided by the managing bodies of the undertakings. On Sept. 30, 1937, the president issued another decree, again from Valencia, the substance of which was to validate as from their respective dates the decrees of the Basque autonomous government which Lewis, J., in the present action had held to be ineffective in Spanish law. The decree contained a further clause, to the effect that the contracts or acts carried out by agencies or branches in Spain or abroad of the banks should be void when the person carrying them out failed to comply strictly with the powers, directions or decisions of the organs of legitimate representation of the bank which should be constituted on the basis of the enactments of the government of the republic. It would appear from a decree of the president dated at Valencia on Oct. 21, 1937, that the presidential decrees already mentioned were confirmed and made legal by the Cortes as the legislative organ of the government of the Spanish republic. On Dec. 24, 1937, a further presidential decree was issued from Valencia, which is said subsequently to have been ratified by the Cortes, declaring null and void all meetings of shareholders or of any other organs of administration of mercantile companies and concerns of all types when held outside the national territory under the legal government of the republic.

It is material to note that all these legislative acts of the republican government of Spain, in so far as they are relevant to the present proceedings, are dealing with companies having their corporate home within a territory which, at the respective dates, was under the administrative control of General Franco's government, recognised by His Majesty's government as being the *de facto* government of the area in question.

To make the story complete, although the facts to be mentioned are probably not strictly material for the purposes of the present proceedings, it is desirable to state that, on Dec. 27, 1937, a meeting of shareholders of the Banco de Bilbao took place in Bilbao—convened, as it would seem, by the original board which had been dispossessed by the Basque autonomous government in favour of the new board early in 1937—at which comprehensive resolutions were passed repudiating the authority of the solicitors who instructed counsel appearing in the present proceedings for the Banco de Bilbao, and ratifying and confirming the authority of the defendants in these actions to represent the bank in London. Two days afterwards, the *de facto* government of General Franco in Bilbao issued a decree the purport of which, to put it shortly, was to nullify any change made in the legal domicil of such a company as the Banco de Bilbao since July 18, 1936, and to nullify any proceedings by the Spanish republican government directed against the board of the Banco de Bilbao as it stood before July 18, 1936. The decree was to operate retroactively as from July 18, 1936.

In this state of facts, the appeal from LEWIS, J., comes before this court. Counsel for the appellants, while seeking to reverse the orders made by LEWIS, J., in effect dismissing their actions, did not place before the court any argument in support of the view that, as matters stood at the time that the judge dealt with the action, his finding of fact as to the invalidity, according to Spanish law, of the decrees of the Basque autonomous government was otherwise than correct. They, however, asked for the reversal of this finding, on the footing that the legislation of the Spanish republican government which had taken place at the dates stated above, subsequent to the fall of Bilbao on June 19, 1937, was effective to ratify the Basque government decrees and to make them good according to Spanish law, with the result that (assuming the sufficiency of the evidence before LEWIS, J., of the authority given by the new board to Albisu) Albisu would have to be treated as the authorised emissary of the new board as a legally constituted board, with the result that this action ought to succeed.

It is not necessary to pursue the interesting point whether or not a plaintiff, whose action was quite properly dismissed at the date at which it came on for trial, can in this court properly claim reversal of that judgment in view of the occurrences since the date of the judgment. It may well be that such occurrences might, in a proper case, be taken into account so as to relieve an unsuccessful defendant from the continuing effects of relief granted against him, but there are obviously serious questions to be considered where it is sought to call in aid subsequent occurrences with a view to giving an unsuccessful plaintiff relief to which, at the date of the trial of the action, he is admittedly not entitled.

It will be observed, however, that, if the principles already mentioned as having been laid down by the House of Lords had been regarded, the aspect of the matter would have been different. There would have been a motion to set aside the writ as having been issued without due authority, and presumably the court would so have held, and the proceedings would have been struck out in the court of first instance. The effect of the subsequent legislation, if (as the appellants contended before this court) it had been valid and effective, would have enabled those who used the bank's name in the original action to issue a new writ in the bank's name, which, on the same hypothesis, could not have been struck out, and to the new action (on the same hypothesis) the defendants would have had no defence. If, on the other hand, the true view were that the subsequent legislation was not valid and effective, the new action would have been struck out or stayed. At all events, the point would have had to be, and would have been, determined one way or the other.

This being the position, it would be academic to pursue the question as to the exact effect on a judgment of the court of subsequent events in such a case as the present, and it seems best, without further considering difficulties of this nature, to face the question of the effect of this new legislation of the Spanish republican government on the position of affairs.

The question of what body of directors has the legal right of representing the Banco de Bilbao, a commercial entity organised under the laws prevailing in Bilbao, and having its corporate home in Bilbao, must depend, in the first place, on the articles under which it is constituted. The interpretation of those articles, and the operation of them, having regard to the general law, must be governed by the *lex loci contractus* (see per LORD WRENBURY in *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1), at p. 149), i.e., by the law from time to time prevailing at the place where the corporate home (*domicilio social*) was set up. It seems clear that, for example, a law of the French legislature cannot have—at all events, outside France—any operation in regard to the relations between an English company established in England under English law and its shareholders, on the one hand, and persons claiming as a board of directors to have control over the affairs of that company, on the other. The question accordingly resolves itself into this: What is the government whose laws govern in such a matter the Banco de Bilbao? The answer would seem necessarily to be: the government of the territory in which Bilbao is situate. Should the question arise as to what government must be recognised in this court as the government of the territory in which Bilbao is situate, the question must, in case of doubt, be resolved by a statement made by His Majesty to this court through the appropriate channel.

The propositions so far enunciated seem to be indisputable. The only question open to argument arises from the fact that His Majesty's government recognises the Spanish republican government, with its seat in Valencia or Barcelona, as the *de jure* government of the whole of Spain, but at the same time recognises the insurgent government of General Franco as the government *de facto* of the area in which Bilbao is situate. So far, at all events, as this court is concerned, this question seems to be settled by the principles laid down in decisions of this court in *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor* (3), and *White, Child & Beney, Ltd.* v. *Eagle Star & British Dominions Insurance Co.* (4), which may be conveniently summarised, following in substance the language used in a court of first instance, in the case of *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (5), at pp. 519, 522, as follows—namely, that this court is bound to treat the acts of the government which His Majesty's government recognised as the *de facto* government of the area in question as acts which cannot be impugned as the acts of an usurping government, and, conversely, the court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognised by His Majesty's government as the *de jure* government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's courts.

Thus, in the courts of this country no regard can be paid, for the present purpose, to the legislation enacted by the republican government, which, during the material period, cannot be treated in this court as the government of the area in which Bilbao is situated. In other words, it is not open to counsel for the plaintiffs to rely in this court on the legislation on which alone their argument can be based.

A It remains to mention a further point. As has already been stated, LEWIS, J., accepted certain notarial documents placed before him as sufficient evidence that Albisu was the duly authorised representative of the bank, in so far as the new board could so appoint him. If the evidence was insufficient the judge would have held that, on that ground, B the action failed. After careful consideration of the notarial documents, we cannot satisfy ourselves that they were admissible in evidence as proof of Albisu's authority. They amount merely to statements that a person who appeared before the notary alleged that the board of the bank had passed a resolution granting proper authority to Albisu, but C no attempt was made to prove, either by the production of the minute book or by the evidence of a person present on the occasion, that any such resolution was passed, and, if necessary, we should have been prepared to hold on that ground alone that the plaintiffs did not prove the case which they set out to prove in the court below. The appeal thus fails. D Notwithstanding the irregularity of the proceedings in the court below, no purpose would be served by making any other order in this court than an order dismissing the appeal.

Holmes : My Lords, unfortunately your Lordships were not told during the course of the hearing before your Lordships that in fact summonses E were taken out to stay the action on the ground that the solicitors acting for the nominal plaintiffs were not authorised. On the hearing of these summonses, however, LEWIS, J., realising that he must come to a conclusion on these issues before he decided the effect of those summonses, adjourned them to the trial of the issues. In point of fact, those issues F having been tried, then the form of the order was that judgment should be for the defendants, and not that the actions should be stayed. Those summonses, however, were before the court. The only reason why the parties took that course was that we did not want to make the solicitors, in the peculiar circumstances of this case, pay the costs.

G *Appeal dismissed. Leave to appeal to the House of Lords.*

Solicitors : *Petch & Co.* (for the appellants) ; *John Bailey & Co.* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

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NOTE

TRUBYFIELD *v.* GREAT WESTERN RAILWAY CO.

The appeal in this case, reported [1937] 4 All E.R. 614, has been settled.

DENNEHY *v.* BELLAMY.

[Court of Appeal (Greer, Slesser and Clauson, L.JJ.), **March 22, 23, 1938.**]

Insurance—Action by workman against employers—Liquidation of employers—Fresh action against employers' underwriters—No arbitration award in existence—Whether action should be stayed—Third Parties (Rights against Insurers) Act, 1930 (*c.* 25)—*Arbitration Act,* 1934 (*c.* 14), *s.* 3 (4).

The infant plaintiff was employed by B. & Co., and while in their employ sustained serious injuries as the result of an accident. He brought an action against B. & Co. and obtained a judgment which he was unable to enforce as B. & Co. went into liquidation. B. & Co. had started arbitration proceedings against the defendants, who were their underwriters in a policy of insurance which contained a *Scott* v. *Avery* clause. The plaintiff brought the present action, relying upon the Third Parties (Rights against Insurers) Act, 1930. On an application to stay the action on the ground that there was in existence no arbitration award, which alone could give the plaintiff a right of action against the defendants, the judge ordered the action to be stayed. The plaintiff appealed :—

Held : (i) this was not a matter of practice or procedure, but a question of liability to pay such sum as should be found due upon the arbitration, in accordance with the clause in the insurance policy. The Court of Appeal would therefore not interfere with the judge's order unless it could be shown that he had gone wrong in principle, or that his order was one which would produce an injustice.

(ii) the judge was right in refusing to eliminate the condition precedent in accordance with the power given him by the Arbitration Act, 1934, s. 3 (4).

[EDITORIAL NOTE. The case presents two points of importance. The first is whether the staying of an action, owing to the presence in the contract of an arbitration clause in the *Scott* v. *Avery* form, is a mere question of procedure or of liability. The second is whether the judge ought in the circumstances to have exercised the power given him by the Arbitration Act, 1934, s. 3 (4), to treat such a clause as a mere arbitration clause.

As to Award as Condition Precedent, see HALSBURY, Hailsham Edn., Vol. 1, pp. 628-630, para. 1076 ; and for Cases, see DIGEST, Vol. 2, pp. 355-361, Nos. 290-310.]

Cases referred to :

(1) *Evans* v. *Bartlam*, [1937] A.C. 473 ; [1937] 2 All E.R. 646 ; Digest Supp. ; 106 L.J.K.B. 568 ; 157 L.T. 311.

(2) *Freshwater* v. *Western Australian Assurance Co., Ltd.*, [1933] 1 K.B. 515 ; Digest Supp. ; 102 L.J.K.B. 75 ; 148 L.T. 275.

(3) *Beauchamp* v. *National Mutual Indemnity Insurance Co., Ltd.*, [1937] 3 All E.R. 19 ; Digest Supp.

(4) *MacCormick* v. *National Motor & Accident Insurance Union* (1934), 49 Lloyd L.R. 361.

(5) *Marsh* v. *Wood* (1829), 9 B. & C. 659 ; 2 Digest 398, *575* ; 7 L.J.O.S.K.B. 327.

(6) *Maharani Woollen Mills Co.* v. *Anchor Line* (1927), 29 Lloyd L.R. 169.

Appeal from an order of Wrottesley, J., dated Jan. 31, 1938.

The infant plaintiff, a boy of 15, while in the employment of Brooks & Co., had an accident whereby he sustained serious injuries including the loss of a leg. He brought an action against Brooks & Co., and obtained judgment for £2,400 and costs, his father also being awarded

£84 and costs. The plaintiff was unable to recover, because Brooks & Co. went into liquidation. Brooks & Co. had started arbitration proceedings against the defendants, who were their underwriters. The policy of insurance contained a clause whereby the underwriters were to be liable to indemnify the defendants only to the extent found by an arbitrator to be due. The plaintiff brought the present action against the underwriters, relying upon the Third Parties (Rights Against Insurers) Act, 1930. The defendants thereupon took out a summons asking to have the action stayed, upon the ground that it could not succeed, owing to the fact that there was no award of an arbitration in existence. This was an appeal from a decision of Wrottesley, J., who reversed the decision of Master Horridge, and ordered that the action be stayed.

The Arbitration Act, 1934, s. 3 (4), provides as follows:

> Where it is provided (whether by means of a provision in the arbitration agreement or otherwise), that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the court, if it orders (whether under this section or under any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

Maxwell Fyfe, K.C., and *C. N. Shawcross* for the appellant.

H. D. Samuels, K.C., and *S. R. Edgedale* for the respondent.

Fyfe, K.C.: The plaintiff cannot be bound by the result of an arbitration between Brooks & Co. and the defendants. The plaintiff can bring an action without waiting for any award. [Counsel referred to *Freshwater* v. *Western Australian Assurance Co., Ltd.* (2), the Arbitration Act, 1899, s. 4, and the Arbitration Act, 1934, s. 3.] Here the court has additional rights under the 1934 Act, which the court in the *Freshwater* case (2) had not got. The exceptions in the insurance policy are so wide that they may exclude all common law risks. If that is so, the policy is void. That is a difficult question of law, and better determined by a judge. [Counsel referred to *Beauchamp* v. *National Mutual Indemnity Insurance Co., Ltd.* (3).] An arbitration is the most inconvenient form of proceeding to determine such a question. The plaintiff never agreed to arbitration. The essence of an arbitration clause is that the parties have chosen their own tribunal. If cl. 8 is repugnant, in that it abolishes the cover the policy purports to give, then that clause goes, and the plaintiff must get judgment in this action. [Counsel also referred to *MacCormick's* case (4), *Evans* v. *Bartlam* (1), *Marsh* v. *Wood* (5), and *Maharani Woollen Mills Co.* v. *Anchor Line* (6).]

Samuels, K.C., was not called on.

Greer, L.J.: This is an appeal from the decision of the judge in chambers staying an action by reason of an arbitration clause in the *Scott* v. *Avery* form. There are two questions which have to be considered. This is a matter for the discretion of the judge, and we cannot interfere with his discretion unless we come to the conclusion either that he has exercised his discretion upon some wrong principle of law, or, to use the words which have been quoted from the recent opinion of Lord Atkin in *Evans* v. *Bartlam* (1) in the House of Lords, if the order is one which produces an injustice. Nobody has ever suggested that it would be right to uphold an order the result of which would be to do an injustice to one or other of the parties merely on the ground that the matter under decision is one for the discretion of the judge. That was very well illustrated by a case that came before this court in reference to an order made by Lord Hewart, L.C.J., within his discretion with regard to the date at which an action should be tried. It was held that, inasmuch as it would be unjust to one of the parties, who, by reason of his service in India, could not get back to this country to be present at the hearing of his case, that was something which this court would be entitled to remedy, because of its injustice. If I used words which did not satisfy Lord Atkin because perhaps they were too wide, it was never my intention to exclude from the consideration of the court the fact that, if the judge does not give effect to a question which is a question of justice between the parties, we can interfere.

In the present case, all the arguments which have been put before us were presented to the judge, and the judge refused to give effect to them. He thought, by reason of the form of the arbitration clause, that it would be useless to allow the action to go on, because it could not possibly succeed. The promise to indemnify was not a mere promise to indemnify, but a promise to indemnify to this extent—by paying the sum which should be found by an arbitrator to be due. That was the only promise of indemnity which can be read into a contract of this kind, where the condition is in what has been conveniently referred to as the *Scott* v. *Avery* form.

That being the position, we have had an interesting argument from Mr. Maxwell Fyfe to the effect that this is a matter of procedure, and that therefore we ought to decide that the judge was wrong in the view that he took in principle, because the matter which he was deciding was only a matter of procedure, whereas he seems to have thought that it was a question of liability under the contract. I think that that is quite wrong. I think it was a question of liability under the contract, and it would have been perfectly useless to anybody to allow the action to go on, because the action must necessarily fail, inasmuch as the plaintiff in the action was not in a position to prove that the condition precedent to his liability had in fact been performed.

It is quite true that under the Arbitration Act, 1934, s. 3 (4), the judge had power, if he thought right to do it, to eliminate from the contract the promise that had been made with reference to the condition precedent, and to treat it as if it were a mere arbitration clause. However, it was for him to judge, and to decide whether or not he would do so. Having heard all the arguments on the one side and on the other, in his discretion he refused to exercise the powers which he was entitled to exercise under sect. 3 (4). I think that it was entirely within his discretion to say whether or not he would exercise these powers which were given to him by that statute. For these reasons, I think that the argument, which would be quite effective if this were a mere arbitration clause, is not effective, by reason of the fact that the only promise on which the plaintiff can rely in this case is a promise to pay that which shall be found to be due by the arbitrator appointed as the sole person to decide, as between himself and the insurance company, in relation to liability.

Mr. Samuels has said that he does not contend, and he could not really contend, that the plaintiffs were bound by the result of the arbitration between Brooks, Ltd., and the insurance company ; but he has succeeded to rights without being bound by something which took place in an arbitration to which he was not a party. However, the defendant is still entitled to say that under the contract of insurance neither the original insurer nor the plaintiff who succeeded to the substantive rights of the insured can recover unless he first obtains an arbitral award in his favour. That is not a matter of practice or procedure, but a question of the liability to perform the promise which is contained in the arbitration clause. For some reason or other, the plaintiff seems afraid that the result of the arbitration and such proceedings as may be taken thereafter may not be in his favour, but I think that he is unduly suspicious of the arbitrators who will have to decide this question, and also of the court, which by means of a stated case has control over the decision of the arbitrators. For these reasons, I think that this appeal must be dismissed with costs in any event.

SLESSER, L.J. : I agree, and wish to add only a word with regard to the general argument apart from the question raised under the Arbitration Act. This case seems to me indistinguishable in principle from that of *Freshwater* v. *West Australian Assurance Co., Ltd.* (2). There the plaintiff was injured, and recovered judgment against a certain defendant who was insured against third-party risks with an insurance containing an arbitration clause of the *Scott* v. *Avery* type, such as we have here to consider. The assured became bankrupt, and the plaintiff sought under the Third Parties (Rights Against Insurers) Act, 1930, to recover against the insurance company. The defendant company there took out a summons to stay the action, on the ground that, under the arbitration clause, the obtaining of an award was a condition precedent to bringing an action. Mr. Croom-Johnson for the plaintiff argued, relying upon the Road Traffic Act, 1930, and the Third Parties (Rights Against Insurers) Act, 1930, that that obligation to obtain the award was not binding upon him. ROMER, L.J., says, at p. 526 :

> He [Mr. Croom-Johnson] says that to hold it is binding upon him would be to run contrary to the provisions of the Road Traffic Act, 1930, s. 36 (4).

Then follow these words, which apply equally, as I read them, to the Third Parties (Rights Against Insurers) Act, 1930:

> but when one looks at the policy it is plain that the liability which the policy purports to impose upon the insurance company is a liability to pay such amount as shall in the first instance be determined by arbitration, and that it is a condition precedent to that company's liability to make any payment that an award shall have been made. To hold that the plaintiff in this matter is bound by the arbitration clause in the policy is not in the least to deprive him of the advantages and privileges given to him by subsect. 4.

With regard to the matter raised under the Arbitration Act, I agree with Greer, L.J., that that was a question for the discretion of the judge, and that, in the circumstances, we should not disturb that discretion. I would add that, had there been any reason suggested here for thinking that any injustice had been done by the exercise of that discretion in refusing to allow the action to proceed at common law, I think the answer would be that, in all probability, the plaintiff would have been defeated in his action at common law, and would be more likely to suffer injustice by proceeding at common law than he would by proceeding by arbitration.

Clauson, L.J.: I agree. I will only add that I desire to thank Mr. Maxwell Fyfe very much for what I found a most interesting argument, which was none the less interesting because, as it seemed to me, it did not supply any ground upon which we should have been justified in interfering with the discretion exercised by the judge.

Appeal dismissed with costs.

Solicitors: *William Daybell* (for the appellant); *William Charles Crocker* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

WALSH *v.* GEORGE KEMP, LTD.

[Court of Appeal (Greer, Slesser and Clauson, L.JJ.), **March 14, 1938.**]

Practice—Claim by infant plaintiff for damages for personal injuries—Verdict for plaintiff—Appeal by defendants—Action settled while appeal pending—Necessity for obtaining approval of Court of Appeal—R.S.C., Ord. 22, *r.* 14.

An infant plaintiff obtained a judgment awarding damages in respect of personal injuries. The defendants gave notice of appeal, but, while the appeal was pending, the action was settled, the settlement being approved by Charles, J.:—

Held: where an action on behalf of an infant is settled after notice of appeal has been entered, the settlement must be approved by the Court of Appeal.

[**EDITORIAL NOTE.** Once an appeal is entered, the court having seisin of the matter is the Court of Appeal, and interlocutory applications should thereafter be made to the Court of Appeal.

As to Compromise by Person Under Disability, see HALSBURY, Hailsham Edn., Vol. 26, p. 83, para. 149; and for Cases, see DIGEST, Vol. 28, pp. 329-331, Nos. 1972-1997. See also YEARLY SUPREME COURT PRACTICE, 1938, pp. 373, 374.]

APPLICATION for an appeal to stand out of the list, a settlement of an infant plaintiff's claim having been reached.

The plaintiff, Thelma Walsh, an infant, in an action for damages for personal injuries tried by DU PARCQ, J., without a jury, recovered £500. Against this judgment the defendants appealed, but, before the appeal came on for hearing, a settlement was reached, and the agreed sum was paid into the Willesden County Court. Purporting to proceed under R.S.C., Ord. 22, r. 14, an application was made to CHARLES, J., in chambers, when the settlement was approved.

R.S.C., Ord. 22, r. 14, provides as follows:

> (1) In any cause or matter in the King's Bench Division . . . in which money or damages is or are claimed by or on behalf of an infant . . . no settlement or compromise or payment or acceptance of money paid into court, whether before or at or after the trial, shall as regards the claims of any such infant . . . be valid without the approval of the court or a judge.

R. E. Manningham-Buller for the appellants.

W. H. Moresby for the respondent.

Manningham-Buller: This is an application for this appeal to stand out, as money has been paid into the Willesden County Court, and there may be difficulty in getting it out if the appeal be dismissed. This settlement has been approved by CHARLES, J. R.S.C., Ord. 22, r. 14, contains the words "or after the trial." Therefore, application was made to a judge for his approval of the settlement.

GREER, L.J.: It is important that the practice in these matters should be settled. As soon as an appeal is entered, the Court of Appeal has seisin of the matter, and therefore application must be made to this court for its approval of the settlement.

Later, on the application of counsel for the respondent, the court approved the settlement.

Solicitors: *James Turner & Son* (for the appellants); *J. W. F. Harrison* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

PETERS *v.* GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **April 1, 1938.**]

Insurance—Motor car insurance—Purported assignment of policy by vendor of car—Policy handed to purchaser—Whether person injured by purchaser can recover from insurers.

The vendor of a motor van insured by the defendants handed over the insurance policy with the van to the purchaser. The policy contained the usual clause extending the cover to any person driving with the consent or permission of the insured. The plaintiff, who had been injured by the van after the sale had been completed, obtained a judgment against the purchaser, and in the present action sought to recover the damages he had been awarded from the present defendants under the provisions of the Road Traffic Act, 1934, s. 10. The motor van was sold for £10, of which £5 was paid when the van was handed over and the remaining £5 after the occurrence of the accident:—

Held: (i) at the time of the accident, the purchaser could not be said to be driving the van by the order or with the permission of the vendor, as the van was then the purchaser's own property.

(ii) the insured was not entitled to assign his policy to a third party. An insurance policy is a contract of personal indemnity, and the A
insurers cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them.

Decision of Goddard, J. ([1937] 4 All E.R. 628) *affirmed.*

[EDITORIAL NOTE. An attempt was made in the present case to show that the handing over of the policy on the sale of a car was in law an assignment of the policy. This contention was rejected upon the ground that the insurers relied B
upon the history of the driver. As an alternative it was sought to rely upon the clause in the policy allowing the car to be driven by any person with the permission of the insured, but the court rejected this contention, as the car had, at the material time, become the property of the purchaser.

As to Duty of Insurers to Satisfy Judgments, see HALSBURY, Hailsham C
Edn., Vol. 18, pp. 563-565, paras. 913, 914; and for Cases, see DIGEST, Supp., Insurance, Nos. 3217ee, 3217ff.]

Cases referred to:

(1) *Powles* v. *Innes* (1843), 11 M. & W. 10; 29 Digest 90, *484*; 12 L.J.Ex. 163.

(2) *Rayner* v. *Preston* (1881), 18 Ch.D. 1; 29 Digest 308, *2546*; 50 L.J.Ch. 472; 44 L.T. 787. D

(3) *North of England Oil-Cake Co.* v. *Archangel Insurance Co.* (1875), L.R. 10 Q.B. 249; 29 Digest 92, *495*; 44 L.J.Q.B. 121; 32 L.T. 561.

Appeal from a judgment of Goddard, J., dated Dec. 1, 1937, and reported in [1937] 4 All E.R. 628.

The defendant insurance company issued to C. in respect of his motor E
van a policy of insurance covering him against all risks or liabilities against which he was required by the Road Traffic Acts, 1930-34, to be insured, and containing a clause covering to the same effect any person driving the motor van with the permission or under the orders of C. The premiums on the policy had been paid up to Sept. 30, 1935. In F
July, 1935, C. sold his motor van to P. for £10, of which £5 was paid down and the balance of £5 was to be paid at P.'s convenience. C. handed to P. the insurance policy, an application form for a new policy, the registration book, and the motor van which P. drove away and thereafter used as his own. On Sept. 8, 1935, P., while driving the G
motor van, injured the plaintiff. P. then paid the balance of £5 to C. On June 25, 1936, the plaintiff obtained against P. a judgment totalling £504, including costs, and, as this remained unsatisfied, the plaintiff then brought an action to recover the said sum from the defendant insurance company under the Road Traffic Act, 1934, s. 10. H

A. S. Comyns Carr, K.C., and *Alban Gordon* for the appellant.

H. D. Samuels, K.C., and *Felix Denny* for the respondents.

Comyns Carr, K.C.: *Powles* v. *Innes* (1) shows that the handing over of a policy constitutes an assignment of it. It is wrong to say that a policy is not assignable unless it has express words to that effect. If the document itself is silent, then the question is whether there is anything in it that makes it unassignable. The importance of the personality of the assured is not confined to this class of policy, but extends to almost every policy, including fire and marine. [Counsel referred to *Rayner* v. *Preston* (2), *North of England Oil-Cake Co.* v. *Archangel Insurance Co.* (3).] The car was being driven by P. with the consent of C., and the fact that such consent is included in the other incidents of sale is immaterial.

Samuels, K.C., was not called on.

B Sir Wilfrid Greene, M.R.: In my judgment, this is a perfectly clear case. Mr. Comyns Carr, on behalf of the appellant, takes two points. First of all, he says that, when the car was sold by Coomber to Pope in July, 1935, and the policy of insurance with other documents was handed over, there was an assignment of the policy. Assuming C in his favour that there was an intention to assign the policy, the fundamental question remains: Is this policy one which is capable of assignment? The judge held that it was not, and I am in entire agreement with that.

The policy is one under which the insurers undertake to indemnify D the policyholder, who is described in the schedule as Mr. Coomber, against liability at common law:

> for compensation and claimant's costs and expenses in respect of: Death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the schedule hereto.

E Then there is a provision under which the insurer is to "treat as though he were the policyholder any person who is driving such vehicle on the policyholder's order or with his permission," subject to certain qualifications which are not material to be stated. The effect of that, therefore, is that Mr. Coomber is indemnified, and that persons whom F Mr. Coomber orders or permits to use the car are indemnified. It is said that the contract between Mr. Coomber and the insurance company constituted by that document is assignable. It appears to me to be as plain as anything can be that a contract of that kind is in its very nature not assignable. The effect of the assignment, if it were possible to assign, G was stated by Mr. Comyns Carr to be that, from and after the assignment, the name of Mr. Pope, the assignee, would have taken the place of that of Mr. Coomber in the policy, and the policy would have to be read as though Mr. Pope's name were mentioned instead of Mr. Coomber's. In other words, the effect of the assignment would be to impose upon the H insurance company an obligation to indemnify a new assured, or persons ordered or permitted to drive by that new assured. That appears to me to be altering *in toto* the character of the risk under a policy of this kind. The risk that A.B. is going to incur liability by driving his motor car, or that persons authorised by A.B. are going to cause injury by driving his motor car, is one thing. The risk that C.D. will incur liability by driving a motor car, or that persons authorised by C.D. will incur liability through driving a motor car, is, or may be, a totally different thing.

The insurance company in this case, as in every case, make inquiries as to the driving record of the person proposing to take out a policy of insurance with them. The business reasons for that are obvious, because a man with a good record will be received at an ordinary rate of premium and a man with a bad record may not be received at all, or may be asked to pay a higher premium. The policy is, in a very true sense, one in which there is inherent a personal element of such a character as to make it, in my opinion, quite impossible to say that the policy is one assignable at the volition of the assured. That is all I need say upon that branch of the argument.

The other branch of the argument is to this effect. Under the Road Traffic Act, 1930, s. 35, it is made unlawful for any person to drive a motor vehicle on a road unless there is in force in relation to the user of the vehicle a policy, and it is unlawful for a person to cause or permit any other person to use a motor vehicle unless there is in force a policy covering the user by that other person. In consequence of that statutory enactment, the policies which are taken out for the purpose of complying with the Act contain the provision which I have already read, under which the insurers treat as though he were the policyholder any person who is driving such vehicle on the policyholder's order or with his permission. Under the Road Traffic Act, 1934, s. 10, it is provided that, if, when a certificate of insurance has been issued, judgment is recovered in respect of a liability covered by the policy against any person insured by the policy, then the insurer is liable to pay to the person entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, subject to certain exceptions which need not be stated, as they are not material to the facts of this case.

What happened here was that Peters obtained a judgment against Pope, and he seeks under sect. 10 to make the present respondents, the insurance company, liable, upon the ground that he has obtained a judgment against a person insured by the policy, He says that Pope is a person insured by the policy, because Pope, on the true construction of the policy, is a person who was driving the car with Coomber's permission. The answer to that is, in my opinion, short and clear. At the date when the accident took place, the entire property in this car was vested in Pope. He had bought the car. On the sale of the car, the property passed to him, and, although Mr. Comyns Carr at one stage of the argument appeared to suggest that it had not, yet, when his attention was called to the evidence, he felt himself constrained to give up that point. The property, therefore, passed to the purchaser long before this accident took place. The circumstance that he had not paid the whole of the purchase price is irrelevant for that purpose, because that circumstance does not leave in the vendor, Mr. Coomber, any interest in the car.

There is no vendor's lien, or anything of that sort. The car had become the out-and-out property of Pope. When Pope was using that car, he was not using it by the permission of Coomber. It is an entire misuse of language to say that. He was using it as owner, and by virtue of his rights as owner, and not by virtue of any permission of Coomber.

A In my judgment, the proposition has only to be stated to be answered, and the result is that the judgment appealed against is affirmed, and the appeal is dismissed with costs.

SCOTT, L.J.: I agree.

B MACKINNON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Musson & Co.* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

C

DANIELS *v.* VAUX.

[KING'S BENCH DIVISION (Humphreys, J.), **March 17, 18, 1938.**]

D *Street Traffic—Motor car—Negligent driver a bailee and of substantial means—Owner uninsured—Claim against owner on ground of breach of statutory duty not to permit an uninsured person to drive—Road Traffic Act,* 1930 (*c.* 43), *s.* 35 (1).

The defendant allowed her son, an officer in the Army, to use one of her cars in all respects as his own, except that it remained registered in her name, and was included in the policy of insurance which covered E her other cars. This arrangement continued for about two years. It was then arranged that he should pay the insurance himself, and the company was instructed to delete it from the defendant's policy. A few days after this change, the son negligently ran down the plaintiff, a police officer on duty, doing him serious injury. He had not insured, as arranged with his mother. There were lengthy negotiations for a settlement of a claim against the son, and before an agreement was F reached he was killed in a polo accident. A writ was then issued against the defendant, any claim against the deceased officer's estate being out of time. The claim alleged that the defendant's son was her servant or agent when driving the car, and, in the alternative, claimed that the damages suffered by the plaintiff were the result of her breach of her statutory duty, under the Road Traffic Act, 1930, s. 35, in allowing G her car to be used without a policy of insurance being in force. It was admitted that in the circumstances the car was the defendant's property, and it was alleged that the son was a gratuitous bailee of the vehicle. It was also admitted that the deceased was of sufficient substance to have paid any damages which might reasonably have been awarded:—

HELD: (i) the son was not the defendant's servant or agent to drive H the car.

(ii) the plaintiff's inability to recover damages against the deceased, or his estate, was due to the delay in commencing the action, and not to the defendant's breach of her duty to insure.

[EDITORIAL NOTE. The case of *Monk* v. *Warbey* (4) established that an injured person might rely on a breach of the statutory duty to insure on the part of the motorist. The present case indicates what may be described as an exception to that liability. It is, of course, necessary, in every case where reliance is placed upon a breach of statutory duty, to prove that the damages flow from the breach of statutory duty, and not from some other cause. It is here held that the plaintiff's failure to commence in due time an action against a negligent driver, who was a person of such substance that any reasonable damages might have been recovered from him or his estate, was the real cause of the loss, and not the defendant's breach of her statutory duty to insure.

As to the Duty to Insure against Third-party Risks, see HALSBURY, Hailsham Edn., Vol. 18, p. 561, para. 908; and for Cases, see DIGEST, Supp., Insurance, Nos. 3217q-3217ff.]

Cases referred to:

(1) *Barnard* v. *Sully* (1931), 47 T.L.R. 557; Digest Supp.

(2) *Parker* v. *Miller* (1926), 42 T.L.R. 408; 36 Digest 64, *415*.

(3) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 34 Digest 126, *966*; 9 L.J. Ex. 308.

(4) *Monk* v. *Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.

Action for damages for personal injuries arising out of the running down of the plaintiff, a police officer on duty.

The facts and the arguments are fully set out in the judgment.

J. D. Cassels, K.C., *T. Carthew, K.C.*, and *N. R. Fox-Andrews* for the plaintiff.

Gilbert Beyfus, K.C., and *Montague Berryman* for the defendant.

Humphreys, J.: In this case, the plaintiff, a police officer of the Hampshire constabulary, sues the defendant, Mrs. Vaux, the mother of a young man, now deceased, who on the night of June 20, 1934, drove a motor car so negligently as to cause serious injury to the plaintiff, a police officer on duty regulating the traffic at cross-roads. The negligence is admitted. The injuries are not disputed, and the young man, if he had been alive, would have had no sort or kind of answer to an action for heavy damages against him. The accident happened, as I have stated, on June 20, 1934. The young man who was the cause, by his negligence, of that accident died on Dec. 29, 1936, as a result of another accident, which, in fact, had nothing to do with motor cars at all.

The plaintiff puts his claim against the defendant in two ways. First of all, he says that the deceased man, who was a second lieutenant in the Queen's Bays, stationed at Aldershot, was driving the car as the servant or agent of the defendant. If that is made out, he has to make out nothing more. Secondly, he says in the alternative, that the plaintiff has suffered loss or damage by reason of the defendant's breach of a statutory duty—that is, her duty under the Road Traffic Act, 1930, s. 35—in that she permitted the deceased young man to use the motor car on the road, there being in force in relation to such user no policy of insurance complying with the provisions of the Act. It is common ground that there was in force at the time of the accident no policy of insurance complying with the Act.

I think it desirable, in spite of the fact that the defendant has this morning admitted by her counsel that, for the purpose of this case, it must be taken that she was in law the owner of the car—the owner, at all events, for this purpose, that she was the person who was in a position to permit, or to refuse to permit, her son to drive the motor car at the material time —to review the evidence, and to state what my view of the matter is as to the ownership of the car. This car was purchased by the defendant in 1930, for the use of her four children. She had another car of her own, which she used more particularly for her own purposes, and in Mar., 1932, the position was that the car had been driven up to that time by each of the children—at all events, by those who were old enough to drive the car, and perhaps particularly by the young man, her son. He had finished his course at Sandhurst and was ordered to join his regiment at Aldershot. At that time, a car was necessary to him. All officers must have cars, and, that being so, I accept the defendant's evidence that she said to him something to this effect: "Well, I bought the car for you four children." She then proceeded to review the position of the children. One, a girl, was married, one was a boy at school. Then she said: "That only leaves your one sister at home, and you are going away. I can quite well spare that car"—it was an M.G.—"and you can have it." That was her own expression in giving evidence in the first instance: "You can have that one." She added, on being asked, for some reason or other, by counsel to repeat it a few moments later: "I said to him 'So I will give it to you.'" I have no doubt that the two things mean exactly the same, and mean this: "So far as I am concerned, I do not want to use it, and you may have it." The effect of this handing over of the car by a mother to her son, in my view, has to be considered, when it is alleged that the transaction affects the right of third parties, in much the same way as that in which the law regards transactions between husbands and wives, or fathers and sons, when the transaction is one which might affect the rights of third parties. There is ample authority for the statement that the law looks with very jealous eyes indeed on any supposed gift by a husband to the wife if the result of that will be to deprive the creditors of the husband of some remedy which they would otherwise have against him.

In such a transaction as this, I have not a shadow of doubt that, as between herself and her son, the lady would never have made a claim against him, or objected to his doing anything that he chose to do with that car, treating it as his own. As between them, that sort of handing over of the car is, in my view, not nearly sufficient to enable me to hold, as a matter of law, that from that time the car became the car of the son, and that the lady ceased in law to be the owner. When one comes to look at the further facts, that view is strengthened, because the car continued to be registered by her as her car. She remained the registered owner of the car. What was in her mind—again, I accept what she said—was that she wished to relieve her son of some part of

the expense, and therefore said: "I will pay the registration, and I
will pay the insurance." So she insured the car, and she herself registered
the car, and paid the registration fee which is payable yearly. That she
should have provided the money is nothing at all as between mother
and son. That she should have registered the car in her own name is,
of course, a fact which should not be lost sight of, and would of itself A
be strong *prima facie* evidence that she was at least holding out to
everybody that she was still the owner of this car, whatever might have
been her own view in her heart of hearts as between herself and her
son.

That was what happened, and the result was that, on June 20, the son B
came from Aldershot to dine with his mother, who was staying at
Camberley with her married daughter. On June 20, there was another
conversation. The son seems to have been a very dangerous person
as a motor driver, a very unsafe person to be on the road, because
he had had numerous accidents. These had called for applications C
to the insurance company, who had always paid the necessary
amounts. It had occurred to Mrs. Vaux that it might have a steadying
influence upon the son if he had to pay the insurance himself, and with
that in view she had informed her son that she would not continue to
insure the car, and that he would have to do it himself, and to pay for it. D
She had written to the insurance company to that effect, with the
result that the policy, which was renewable annually on June 14, so
far as this car was concerned, lapsed, and the car became uninsured on
June 14. That, of course, was known to the lady, and it was known
to her son. E

On June 20, when he came to dine with her, she asked him at dinner:
"What about the insurance of the car? Have you insured it?" His
answer was: "No." As she told me, she thinks that he said something
to the effect that he would "like to talk it over with her," which
I gather meant that he probably desired to ask her if she would let him F
have the money, and I have no doubt that she would have let him have
it. However, nothing more was done until the time came for the young
man to leave to go back to barracks, and then the lady, realising that
this car was uninsured, and herself being a motorist of experience, and
knowing that it was a very wrong thing to do—I think she probably G
knew that it was a criminal offence to drive a motor car without a certificate
of insurance—told him this, and I will read her words:

> That she told him that she did not want him to drive the car back that night as it was uninsured. He said that it was the only way he could get back to barracks.

This was probably true. From Camberley to Aldershot is not a great H
distance, but it is a long way to walk, and it would mean that, unless he
borrowed another car from his mother, it was the only way back to
barracks, and so, to use her own expression, "against my better judgment,
I let him drive away."

It has been argued by Mr. Carthew that that intimated that she regarded herself at that time as the owner of the car. I do not think that it does at all. I think it merely shows that she regarded herself still as the mother of quite a young man of 22, and, as his mother, regarded herself as having the right to say to him: "I do not want you to do something which may lead you into trouble." The young man took that A uninsured car, and it was in the course of his drive back to barracks that night that this most regrettable accident to the police officer occurred, as a result, I have no doubt, of his driving much too fast at crossroads.

So much for the question of fact. It is upon that evidence that Mr. Beyfus has said, and I think rightly said, that there was a bailment of B that car from the mother to the son, who held it as bailee. That being so, the lady, who is the defendant, comes within the Road Traffic Act, 1930, s. 35 (1), which provides that:

> . . . it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the C user of the vehicle [a proper policy for the insurance,]

It follows from the facts that I have stated that this lady not only permitted, but also knowingly permitted, that to be done, because she knew that the car was uninsured, as, of course, did her son. In these circumstances, Mr. Carthew has argued, first of all, that the damages D which the police constable suffered were suffered by him as the result of the negligent driving of her servant or agent, who was her son. I confess that I thought that it was established, and had ceased to be argued to the contrary, that, in the ordinary case of a *bona fide* loan of a car by A. to B.—I do not mean a loan for a minute or two, but the E loan for a substantial time—B. was not constituted the servant or agent of A., and that, if B., in the course of that driving, had an accident, no action could be brought against A. on the ground that B. was driving as A.'s servant or agent. Of course, every case must depend upon its own peculiar facts, and there have been cases in which the mere loan F of a car has been held not to prevent the relationship of principal and agent, at least, from arising.

In the first of the two cases to which I have been referred, the case of *Barnard* v. *Sully* (1), I think it was held that the mere fact of the ownership of the car is some evidence to go to the jury against the person who is the G owner of the car, that he permitted the car to be driven by his servant or agent. That, I think, is a mere question of whether there is any evidence to go to a jury in a case where the evidence was extraordinarily slight, and it was held that the mere fact of ownership affords some evidence, in the absence of evidence to the contrary, from which a jury H may draw the conclusion that the owner was permitting some other person to use the car as his servant or agent. I do not think that it decided more than that. The other case is *Parker* v. *Miller* (2), a case which decided that the question of agency is not to be decided upon a mere question of physical control—I am dealing with motor cars now—but upon the question of the right to control. That was an observation of Scrutton, L.J., which is reported very shortly indeed in these terms, at p. 409 :

> Scrutton, L.J., who observed that the test of agency in cases of negligence had ever since *Quarman* v. *Burnett* (3) been, not physical control, but right to control, delivered judgment to the same effect.

The main judgment of Lord Hanworth, M.R., dealt with facts which A are totally and absolutely different from the facts of this case, and, so far as the facts of this case are concerned, it is of no assistance at all to me in this matter.

I accept Mr. Carthew's argument that one has to consider the question of the right to control. All I can say is that, on the facts of B this case, it appears to me to be impossible to say that this lady is liable to the plaintiff because, on Mar. 10, 1932, she had handed over the motor car to her son with the words, " I have no particular need for this car ; I have got another ; you may have my car [one may use " my " instead of " this " car], and take it to barracks and use it." In view C of the fact that she had said that then, and in view of the fact that the son continued to use the car just as though it were his own, coming home only, I think, on an average once in the year, when he drove the car home on leave, and otherwise treated that car just as though it were his own property, and was so treating the car at the time of the D accident, I think that it is quite impossible to say that it has been proved to my satisfaction that he was driving that car as the servant or agent of his mother. It appears to me to be a question of fact, to be decided upon the facts in each case, and, whether it be treated as a question of fact or a matter of law, in my opinion, that kind of action must E fail.

I now come to the second cause of action, which is breach of statutory duty. That has been very carefully discussed in the leading case of *Monk* v. *Warbey* (4). That case, in my opinion, is an authority for this proposition, and I take the proposition from the language of the two F judges who gave judgments in that case of any length. First of all, Greer, L.J., after discussing the question of whether an action lay or not, said, at p. 81 :

> The result of the above construction may be stated as follows : *prima facie* a person who has been injured by the breach of a statute has a right to recover damages G from the person committing it. . .

I believe that to be the whole proposition decided in that case. He went on to say that, on the particular facts of the case which he was considering, it had been shown that the purpose of the Act was to enable a person who had been injured by the breach of that section to recover H civil damages, as well as to make the person committing the breach liable to a penalty, and that, on the facts of the case, it appeared to him to be plain that the plaintiff in that case had in fact suffered damages as the direct result of the breach of the statutory duty. The facts of that case are very short. A person had lent his motor car to two others,

neither of whom was insured, and in circumstances in which the car became uninsured against third-party liability. The action was brought by a third party. There had been an accident when one of those persons was driving it, and neither of those two persons against whom the action might have been brought by the plaintiff for damages which he
A suffered was worth a farthing. The result was that, if they had been insured, as they ought to have been, and if there had been no breach of statutory duty, there would have been an insurance company who would have been liable. The proper proceeding would have been to bring an action against the persons who had caused the damage, and they
B in turn would have recourse to the insurance company, who would have paid, therefore, the damages which would have been recoverable. As the direct result of the failure to insure the car, not a penny could be recovered. Damages, therefore, to the plaintiffs perfectly obviously arose from two things, (i) the negligence of the driver of the motor car,
C and (ii) the failure to insure, which prevented the plaintiff from recovering the damages which he ought to have done. MAUGHAM, L.J., now LORD MAUGHAM, L.C., gave judgment in the case, and, if one may be permitted to say so, a very careful and carefully expressed judgment, he being in some little doubt at the commencement of his judgment, as he said
D at the outset, as to whether an action really lay in the circumstances of this case. However, he finished by saying this, at p. 85:

> On the whole, therefore, I have come to the conclusion that in this case there is nothing in the Act to show that a personal action is precluded by reason of the existence of the special remedy [a conviction and fine] provided for a breach; and further that there is sufficient ground for coming to the conclusion that sect. 35
> E was passed for the purpose of giving a remedy to third persons who might suffer injury by the negligence of the impecunious driver of a car.

It would be, to my mind, obviously wrong to hold that the plaintiff in this case can recover damages from the defendant for her, I may now say, admitted breach of statutory duty, irrespective of the question
F whether or not he has suffered any damage as a result of that breach of duty. It would be wasting time and breath to discuss the question as to whether a member of the public can bring an action for damages against a person merely because he has broken the law. Of course he cannot. He has to show that he himself has been damnified in some way
G by the result of such breach. The difficulty that I have had—and I am quite frank in saying that I have looked with care to see whether it is a fatal difficulty, for I appreciate the very unfortunate position of the plaintiff in this case if I am compelled, as I regret to say I find myself compelled, to give judgment for the defendant—is that I have
H tried to see whether there is any ground upon which it can be said that the plaintiff in this case has been prevented by the breach of statutory duty of the defendant from recovering the damages which he would otherwise have got from somebody else, because I think that really is the result of the case to which I have referred. I cannot find that it is so. I can find no evidence of it. He had a perfectly good cause of

action against the young man. That cause of action would cease as a cause of action against the young man on his death. If the plaintiff had issued his writ before the death of the young man, he would, by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, have a right against the personal representative of the deceased young man. Unfortunately for him, that right has gone, because he had not taken his proceedings by Dec. 29, 1936. I have said in the course of the argument, and I think it right to repeat it, that I do not think that in this case any blame attaches to his solicitors for the failure to take these proceedings, although the time was a very long time. There being a six-months' limitation provided in the Law Reform (Miscellaneous Provisions) Act, 1934, the plaintiff has no remedy against either the deceased person or his personal representative. That fact alone cannot be an argument in favour of his having a remedy against somebody else, and I have to consider the question whether it can really be said that he has lost something as a result of this lady's breach of statutory duty. The position is this. He could have sued the deceased person, and, if he had sued him, and either, in his lifetime or after his death, had recovered damages against him or his personal representative, it is admitted that he would have got his money. That is to say, it is not a case like the one that I have referred to, the leading case of *Monk* v. *Warbey* (4), in which the young man was insolvent. He cannot have had a very large amount of money, but the money would have been forthcoming, in fact, if the damages had been given to the extent of £1,000 or more against him. Then, what is there which has been lost ? In my view, I am now bound to come to the conclusion that the plaintiff is no worse as the result of the breach of statutory duty by the defendant than he would have been if she had not committed that breach of statutory duty, and, if in fact the car had been insured, in truth and in fact, on the facts of this particular case, the insurance company would never have been called upon to pay, unless, of course, they had been called upon by the young man, as no doubt they would have been if he had been insured. However, the absence of an insurance company liable for the damages has caused no damage whatever to the plaintiff. On that ground, and with considerable reluctance, I have to give judgment for the defendant.

I ought to say, perhaps, that Mr. Carthew did address an argument to me of this nature, that the defendant ought to be held liable to pay damages, because by her breach of the law, her breach of the statutory duty, she enabled the young man to drive the car, which caused the accident. What, in fact, she did as the result of her breach of statutory duty was to enable him, not to drive the car, but to drive an uninsured car, and the mere fact that the car was uninsured was nothing to do with the injuries which were suffered by the plaintiff. It was the negligent driving, not the fact that the car was uninsured, which caused it to run into the plaintiff. I only mention that because it was one of the arguments addressed to me by Mr. Carthew. There must be judgment for the defendant.

Judgment for the defendant.

Solicitors: *Coulson & Coulson*, agents for *Foster, Wells & Coggins*, Aldershot (for the plaintiff); *Berrymans* (for the defendant).

A [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re CAMBERWELL (WINGFIELD MEWS) No. 2 CLEARANCE ORDER, 1936, APPLICATION OF BUTLER.

B [KING'S BENCH DIVISION (du Parcq, J.), **March 14, 23, 1938.**]

Public Health—Housing—Clearance order—"Other buildings"—Inclusion in order of garages and workshops—Housing Act, 1936 (c. 51), *Sched. III, para.* 2.

W. Mews was a *cul de sac* upon the three sides of which there were C buildings of two storeys, on the ground floor being garages and workshops and on the upper floor being dwellings. The vertical division between the upper storeys and the lower storeys was not the same in all cases, there were separate entrances in every case, and each floor was separately occupied. There was no finding of fact that each such composite structure was a house. The local authority made a clearance order in respect of both the dwellings on the first floor and the garages D and workshops beneath. A mortgagee of the property contended that there was no power to make an order in respect of the garages and workshops:—

HELD: the order was rightly made, and the garages and workshops were properly included in the order. They were "other buildings" within the meaning of those words in the Housing Act, 1936, Sched. III, para. 2, and, having regard to the proviso to that paragraph, were E rightly included in the order.

[EDITORIAL NOTE. *Prima facie*, clearance orders can be made only in respect of dwelling-houses and the appurtenances thereto. It was therefore argued that the garages and workshops, being physically separate, and also separate in ownership, were not premises which might be subject to a clearance order. They were F brought within the order in the present case by regarding the whole building as one constructed partly for the purposes of a dwelling and partly for other purposes, of which a part, not being the part used for other purposes, was, by reason of disrepair, unfit for human habitation.

AS TO CLEARANCE ORDERS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 536, 537, para. 1138; and FOR CASES, see DIGEST, Supp., Public Health, Nos. G 502g-502u.]

Cases referred to:

(1) *Re Hammersmith (Berghem Mews) Clearance Order*, 1936, *Application of Wilmot*, [1937] 3 All E.R. 539; Digest Supp.; 157 L.T. 142.

(2) *Grant* v. *Langston*, [1900] A.C. 383.

H (3) *Yorkshire Fire & Life Insurance Co.* v. *Clayton* (1881), 8 Q.B.D. 421; 42 Digest 681, *929*; 51 L.J.Q.B. 82; 45 L.T. 697; 1 Tax Cas. 479.

APPLICATION by a mortgagee of the property to quash the Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936, which was confirmed by the Minister of Health on Sept. 8, 1937. The facts and arguments are fully set out in the judgment.

The Housing Act, 1936, s. 188, provides the following definitions of "flat" and "house":

> "Flat" means a separate and self-contained set of premises constructed for use for the purposes of a dwelling and forming part of a building from some other part of which it is divided horizontally, and "block of flats" means a building which contains two or more flats and which consists of three or more storeys exclusive of any storey which is constructed for use for purposes other than those A of a dwelling:
>
> "House" includes any yard, garden, outhouses, and appurtenances belonging thereto or usually enjoyed therewith.

The Housing Act, 1930, s. 62 (2), provides the following definition of "dwelling-house": B

> For the purposes of any provisions of this Act relating to the provision of housing accommodation, the expressions "house" or "dwelling-house" include, unless the context otherwise requires, any part of a building which is occupied, or intended to be occupied, as a separate dwelling.

The Housing Act, 1936, Sched. III, para. 2, provides as follows:

> There shall be excluded from the order any houses or other buildings properly C included in the clearance area only on the ground that by reason of their bad arrangement in relation to other buildings, or the narrowness or bad arrangement of the streets, they are dangerous or injurious to the health of the inhabitants of the area: Provided that the foregoing provisions of this paragraph shall not apply to a building constructed or adapted as, or for the purposes of, a dwelling, or partly for those purposes and partly for other purposes, if any part (not being a part used for other purposes) is by reason of disrepair or sanitary defects unfit for human D habitation.

F. R. Evershed, K.C., and *H. A. Hill* for the appellant.
Valentine Holmes for the respondent.

du Parcq, J.: This is an application to quash the Camberwell E (Wingfield Mews) No. 2 Clearance Order, 1936, which was confirmed by the Minister of Health on Sept. 8, 1937. The area to which the order applies may be described shortly as a *cul de sac*, the three sides of which are formed by a number of buildings of two storeys, with garages and workshops on the ground floor, and dwellings, separately occupied, on F the upper floor. There is, as the plan shows, a separate entrance in each case to the upper floor. The division between the adjoining dwellings does not always correspond with that between the workshops below.

The applicants say that it would be wrong to describe each garage or workshop, together with the dwelling, or part of a dwelling, immediately G above it, as a "house" within the meaning of the Housing Act, 1936, s. 25, or a "dwelling-house" within the meaning of the Housing Act, 1930, s. 1. I agree with this contention, and there is in this case no finding by the Minister of Health that each such composite structure is "a house." The present case is thus distinguishable from *Re Hammersmith (Berghem Mews) Clearance Order, 1936, Application of Wilmot* (1). H

I am of opinion that it would be equally wrong to describe each composite structure as "another building," in contra-distinction to a dwelling-house, within the above-mentioned sections. The question how the structures in the area are properly to be described is one of mixed law and fact. I have no doubt that the correct answer is that the dwellings above are "dwelling-houses" or "houses," and that the garages and workshops below are "other buildings." I am fully conscious of the danger of construing words in one Act of Parliament by reference to decisions of the courts as to the meaning of those words in some other statute, but I think that my view is supported by certain observations made in the House of Lords in *Grant* v. *Langston* (2). That case at least shows that there is nothing repugnant to good sense or contrary to legal canons of construction in the view which I am taking. Their Lordships were dealing with a structure of which the lower floor consisted of a public-house, the upper floor of a dwelling. Subject to this immaterial difference in the facts, their language seems to me to be fairly applicable to the present case. The EARL OF HALSBURY, L.C., said, at p. 392:

> SIR GEORGE JESSEL, M.R., himself in *Yorkshire Fire & Life Insurance Co.* v. *Clayton* (3) said: "In modern times a practice has grown up of putting separate houses one above the other. They are built in separate flats or storeys"; but for all legal and ordinary purposes they are separate houses. . . . It appears to me that in the language of SIR GEORGE JESSEL, M.R., there are two houses built one above the other. I suppose no one would dream of calling them one house if the same conditions which are found to exist here were found to exist in the same structures built side by side, and not one above the other, and, if it is possible to have one house built over another house, then all that has been held to constitute a separate house exists here: there is nothing which is held in common; the one structure is superposed upon the other, and that is all.

LORD MACNAGHTEN said, at p. 395, that the two portions of the building were divided so completely that in fact they formed "separate houses." LORD BRAMPTON said, at p. 399:

> One roof covers the whole building, but each storey is so structurally composed and arranged for permanent occupation by a separate occupier that there is no internal communication of any kind between the two storeys, nor any common staircase or access to or from the street, or from any part of the outside of the premises, each having a separate entrance or entrances therefrom. In short, it would be impossible to erect two separate houses under one roof, or to divide one building into two distinct and separate houses more completely than has been accomplished in the building now under consideration. . . . In law I think that each of these storeys constitutes a distinct and separate house . . .

I have not overlooked the definition of the word "flat" contained in sect. 188 (1) of the 1936 Act. I am not precluded, in my view, from giving the word "house" one of its recognised meanings by reason of the fact that another and less general word is sometimes used in the Act, and is given the same, or a similar, meaning.

I now have to deal with that part, and with that part only, of Mr. Evershed's argument which is relevant on the assumption that the view which I have expressed is correct. His main contention was that, upon that hypothesis, the "other buildings" must be excluded from the order by reason of Sched. III, para. 2, of the Act of 1936. I am of opinion, however, that the proviso in that paragraph operates to prevent such exclusion. Mr. Evershed would have me read the proviso as referring only to cases where the "house" or "other building" *prima facie* to be excluded under para. 2 considered as a separate entity is

> constructed or adapted as, or for the purposes of, a dwelling, or partly for those

> purposes and partly for other purposes, if any part (not being a part used for other purposes) is by reason of disrepair or sanitary defects unfit for human habitation.

I do not so read the proviso. Buildings are included in a clearance area either because they are (i) unfit for human habitation for specified reasons, or because they are (ii) dangerous or injurious to health for specified reasons. The object of Sched. III, para. 2, is, in my opinion, to exclude from the clearance order buildings of the second class, thus exempting them from demolition, unless the effect of excluding a building of the second class would be also to preserve from demolition a building which, or part of which, is within the first class.

Applying the language of the paragraph to the facts of this case, I find that, but for the proviso, the ground-floor premises would all be excluded from the order. However, if they were so excluded, then the provisions of the first part of the paragraph would have been applied to " a building " (namely, the building or structure made up of workshop and dwelling) which falls within the proviso. I think that the intention of the legislature would be defeated if the word " building " in the proviso were read as necessarily meaning a building included in the clearance area as one of the second class, considered as a unit, and without reference to any larger structure of which it may form a part. It is unnecessary for me now to decide whether the whole of Wingfield Mews should be regarded as one building within the meaning of the proviso, or should rather be treated for this purpose as being made up of a number of two-storeyed buildings. The result is the same on either view.

Mr. Evershed further argued that there was some imperfection in the order, and in the proceedings which led to the making of the order. In my opinion, this contention fails. When the statutory resolution was passed, the local authority felt some natural uncertainty as to the proper description of the buildings, but they guarded themselves by a reference—which was not misleading or ambiguous to anyone acquainted with the area—to " other buildings (if any)." The schedule to the clearance order sufficiently identified the buildings to be demolished, and no fault can be found with the order confirming it. Mr. Wrigley's affidavit proves that the Minister decided :

> that the upper floors of the properties the subject-matter of this appeal were, by reason of disrepair or sanitary defects, unfit for human habitation, and that the whole of the said properties were, by reason of their bad arrangement, dangerous or injurious to the health of the inhabitants of the area.

The Minister of Health, being in some doubt as to the legal effect of his finding of fact, has stated the facts found by him so that the court may be in a position to draw the correct legal inference from them. I am satisfied that there was ample evidence before him to support his findings of fact, and he was, in my opinion, entitled, having so found, to confirm the order.

It only remains to deal with one minor point. Mr. Evershed submitted that the resolution of the local authority was bad because it was conditional in form. If due notice of this objection had been given to the Minister, I was told, and it was not disputed, that he would have been in a position to prove that what I may call the suspensive condition attached to the resolution was in fact fulfilled by a notice from the London County Council such as the resolution contemplated. In the circumstances, there is, in my judgment, nothing in this point. The application is dismissed with costs.

Application dismissed with costs.

Solicitors : *Barnes & Butler* (for the appellant) ; *The Solicitor, Ministry of Health* (for the respondent).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

GOWER *v.* GOWER.

[Probate, Divorce and Admiralty Division (Henn Collins, J. **March 14, 1938**.]

Divorce—Contempt of court—Non-payment of wife's costs—Application by respondent husband to make decree absolute—Contempt due to want of means —Discretion of the court—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 9.

Upon the petition of the wife, a decree *nisi* of dissolution was granted on Jan. 23, 1935, and the usual order was made that the husband should pay the taxed costs of the wife. The husband failed to pay these costs by reason, as the court found, of his lack of means. The wife, as the court also found, did not move the court to make the decree absolute, hoping in that way to force the husband to pay the costs. The husband brought this motion to make the decree absolute. The wife resisted the application, and by a cross-motion asked that the decree might be rescinded and that she might be granted a decree of judicial separation :—

Held : the court in the exercise of its discretion should allow the decree to be made absolute, because, although the husband was technically in contempt, such contempt was due to his misfortune rather than to his fault.

[EDITORIAL NOTE. Generally speaking, the court may refuse to permit a party in contempt to take a further part in the litigation unless or until the contempt is purged ; but, where the contempt is not due to any wilful act of the party, the court in the exercise of its discretion may hear, and even make an order in favour of, the party thus technically in contempt.

As to Contempt in Procedure, see HALSBURY, Hailsham Edn., Vol. 7, pp. 25-29, paras. 38, 39 ; and for Cases, see DIGEST, Vol. 16, pp. 38-41, Nos. 400-426.]

Cases referred to :

(1) *Hunter* v. *Hunter,* [1934] P. 92 ; Digest Supp. ; 103 L.J.P. 41 ; 150 L.T. 515.

(2) *Leavis* v. *Leavis,* [1921] P. 299 ; 27 Digest 542, *5915* ; 90 L.J.P. 302 ; 125 L.T. 28.

Motion by the respondent husband under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 183, as amended by the Matrimonial Causes Act, 1937, s. 9, to make absolute the decree *nisi* of dissolution which had been granted on the petition of the wife on Jan. 23, 1935. The wife resisted the application, on the ground, *inter alia*, that the respondent had not complied with an order made against him to pay the taxed costs of her suit. There was also before the court a cross-motion by her to rescind the decree of dissolution, and to grant her a judicial separation.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 183, which provides for the making absolute of a decree *nisi*, has had a third A subsection added to it by the Matrimonial Causes Act, 1937, s. 9. This subsection reads as follows:

> (3) Where a decree *nisi* has been obtained, whether before or after the passing of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of B three months from the earliest date on which that party could have made such an application, the party against whom the decree *nisi* has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit.

Talbot Dyer for the respondent, the husband.
E. V. E. White for the petitioner, the wife. C

HENN COLLINS, J.: As far as the facts are concerned, I think that the ruling motive of the wife is purely financial, and I think that I cannot do better, in these circumstances, than guide myself by the words of SIR BOYD MERRIMAN, P., in *Hunter* v. *Hunter* (1), which has been D cited to me, in which he said, at p. 94:

> '. . I should view with great disfavour any case in which I was satisfied that there had been a deliberate holding up of the decree absolute or a deliberate failure to prosecute the petition after decree *nisi* for the purpose of extracting terms more favourable to the petitioner than those contemplated when the decree *nisi* was E pronounced.

I think that exactly expresses, not only the proper conclusion of law, but also my conclusion of the facts on this appeal. That is rather inverting the order. I am now dealing with the wife's application.

Then it is said that the husband's application to make the decree *nisi* F absolute should not be granted, because he has not paid the costs. Quite true, he is in contempt in that respect, but I am also satisfied, by *Leavis* v. *Leavis* (2), that that is a matter for my discretion. In *Leavis* v. *Leavis* (2), HILL, J., says, at p. 301:

> I have come to the conclusion that it is a matter of discretion for the court to G consider, upon all the circumstances of the case, whether the summons of the respondent should be heard and that it is matter material to the exercise of that discretion to consider whether those circumstances are due to the fault or to the misfortune of the respondent.

I have an affidavit of the respondent here, which discloses his means, and they appear to be solely his pension, as a retired captain in the H Army, of £157 a year, out of which he has been paying under the orders of the court, for his wife's maintenance, something like half. I cannot help thinking that his contempt is only a technical one, on account of his inability to pay. In these circumstances, I exercise my discretion in his favour. The result will be that the decree will be in the list in a week's time—this day week—and the affidavits will have to be brought up to date, of course, meanwhile.

Solicitors: *Francis & Crookenden* (for the respondent, the husband); *Reid Sharman & Co.* (for the petitioner, the wife).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*

NIPPON YUSEN KAISHA v. RAMJIBAN SEROWGEE.

[PRIVY COUNCIL (Lord Wright, Lord Romer, Sir Lancelot Sanderson, Lord Normand, Sir Shadi Lal), **February 14, 15, 17, March 11, 1938.**]

Privy Council—India—Shipping—Bills of lading—Issued to shippers without production of mate's receipts—Sellers to have vendor's lien so long as they held mate's receipts—Indorsement of bills of lading—Rights of sellers in conversion.

The respondents, a firm of merchants and brokers carrying on business in Calcutta, entered into three identical contracts in the form approved by the Indian Jute Manufacturers' Association with three mills respectively for the purchase of 250 bales of gunnies, and on the same day they sold the same quantity of 250 bales to a company called the International Export Co., Ltd., also carrying on business in Calcutta. The contracts stipulated for delivery free alongside vessel in the port of Calcutta, for payment in exchange for mate's receipts, but, so long as the mate's receipts were in the possession of the sellers, their lien on both mate's receipts and goods as unpaid vendors should subsist. The Export Co. in due course engaged freight from the appellants, a Japanese shipowning company. The terms of engagement stipulated that the goods should be sent alongside on notice, that freight was payable in Calcutta, and that the mate's receipt must be exchanged for a bill of lading. Subsequently the Export Co. gave shipping instructions to the respondents, which they passed on to the three mills, who sent alongside the 250 bales to two ships owned by the appellants, who received them in accordance with the shipping engagement between themselves and the Export Co., and issued mate's receipts. These receipts were severally delivered to the mills' sircars. In three cases on the same day as the mate's receipts were severally given, and in one case on the following day, the appellants issued the respective bills of lading describing the goods as shipped by the Export Co., without the mate's receipts being given in exchange, but an indemnity was in each case taken from the Export Co. by the appellants. At these several dates, the respondents were not themselves in possession of the mate's receipts, which they obtained from the mills a few days later against payment, and tendered them to the Export Co., who defaulted in payment. Thereupon the respondents gave notice in writing to the appellants that they had an unsatisfied lien or claim for the price, and were entitled to retain the relative mate's receipts, and that bills of lading must not be issued by the appellants until mate's receipts were surrendered to them. By that time the Export Co., having the bills of lading in their possession, had resold the goods to purchasers in Japan, and had drawn bills of exchange for the price on the purchasers, which they had discounted with a bank, and had indorsed to them by way of security the bills of lading. The respondents, as they could get no satisfaction from the Export Co., and as the appellants replied that they had passed bills of lading on the shippers' (i.e. the Export Co.'s) own letter of guarantee, and referred the respondents to the shippers, claimed payment of the price from the Export Co., and damages from the appellants :—

Held : (i) the property in the goods passed to the sellers upon delivery alongside.

(ii) the appellants had neither express nor implied notice that the Export Co. were not the holders of the mate's receipts and the proper persons to receive the bills of lading. The case must be treated as one where shipowners, having for their own protection stipulated that bills of lading were to be given only in exchange for mate's receipts, waived that provision, and without notice issued bills of lading to named shippers and owners of cargo. The practice of taking an indemnity upon the issue of the bills of lading is so well established that no sinister inference can be drawn from its being followed.

(iii) the terms of the contracts as to the unpaid vendor's lien, coupled with the retention of the mate's receipts, did not give the respondents such a possession of the property as would give them a right of action in conversion.

(iv) the equitable lien of the respondents did not affect the title of an indorsee of the bill of lading for value and without notice.

[**EDITORIAL NOTE.** In *Lloyds Bank, Ltd.* v. *Bank of America National Trust and Savings Association*, [1938] 2 All E.R. 63, MacKinnon, L.J., said, at p. 73, "The truth is that almost every aspect of commercial dealing is not proof against the possible result of very rare frauds that a lawyer, thinking of the possibilities of such things, might suppose to be so easy. . . . I have no doubt that this very convenient practice will be able to continue, and that it will be able to continue because the whole basis of business rests upon honesty and good faith, and it is very rarely that such an expectation is defeated." In the present case, a convenient commercial practice might perhaps seem to be imperilled by the unexpected insolvency of a firm of considerable standing, but, as MacKinnon, L.J., has so well said, the real basis of the practice is the good faith of the commercial firms concerned. The judgment herein contains a critical analysis of the legal effect of the reservation of a vendor's lien coupled with the retention of mate's receipts. The object of this is to determine whether a party so protecting himself is in a position to bring an action in conversion against a shipowner who delivers the goods to a *bona fide* indorsee of the bill of lading. This turns upon a careful distinction between the common law possessory lien and the equitable lien, which is in effect nothing more than a charge upon the property which can be enforced only by the equitable remedy of sale under an order of the court. The importance of the difference in the nature of these two liens is that the common law lien imports a right to the possession of the goods, whereas the equitable lien imports that the right to the possession of the goods is in a person other than the person claiming the lien; and, of course, a right to possession is necessary to support an action in conversion.

As to Mate's Receipts, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 152, 153, para. 239; and for Cases, see DIGEST, Vol. 41, pp. 373-375, Nos. 2201-2211.]

Cases referred to :

(1) *Nippon Yusen Kaisha* v. *Mahaliram Ramjidas* (1930), 52 Calc. L.J. 365.

(2) *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.*, [1935] A.C. 53; Digest Supp.; 104 L.J.P.C. 1; 152 L.T. 170.

(3) *Howes* v. *Ball* (1827), 7 B. & C. 481; 39 Digest 642, *2383*; 6 L.J.O.S.K.B. 106.

(4) *Hathesing* v. *Laing, Laing* v. *Zeden* (1873), L.R. 17 Eq. 92; 6 Digest 456, *2908a*; 43 L.J.Ch. 233; 29 L.T. 734; *subsequent proceedings* (1874), 9 Ch. App. 736.

(5) *Pease* v. *Gloahec, The Marie Joseph* (1866), L.R. 1 P.C. 219; 39 Digest 634, *2307*; 35 L.J.P.C. 66; 15 L.T. 6.

(6) *Evans* v. *Nichol* (1841), 3 Man. & G. 614; 39 Digest 495, *1118*; 11 L.J.C.P. 6.

(7) *Craven* v. *Ryder* (1816), 6 Taunt. 433 ; 39 Digest 632, *2292.*

(8) *Kasi Persad Narain* (*Baboo*) v. *Kawalbasi Kooer* (*Mussumat*) (1851), 5 Moo. Ind. App. 146 ; 16 Digest 145, *435.*

(9) *Sewell* v. *Burdick* (1884), 10 App. Cas. 74 ; 41 Digest 372, *2186* ; 54 L.J.Q.B. 156 ; 52 L.T. 445 ; *revsg.* S.C., 13 Q.B.D. 159 ; *restg.* (1883), 10 Q.B.D. 363.

(10) *Whitehorn Brothers* v. *Davison*, [1911] 1 K.B. 463 ; 39 Digest 535, *1458* ; A 80 L.J.K.B. 425 ; 104 L.T. 234.

(11) *Cheah Soo Tuan, Official Assignee of the Estate of* v. *Khoo Saw Cheow*, [1931] A.C. 67 ; Digest Supp. ; 100 L.J.P.C. 45 ; 144 L.T. 130.

(12) *Pope* v. *Official Assignee, Rangoon* (1933), L.R. 60 Ind. App. 362.

(13) *Bhup Narain Singh* v. *Goku Chand Mahton* (1933), L.R. 61 Ind. App. 115.

(14) *Gobind Chunder Sein* v. *Ryan* (1861), 15 Moo. P.C.C. 230 ; 1 Digest 345, B *564* ; 5 L.T. 559.

(15) *Heap* v. *Motorists Advisory Agency, Ltd.*, [1923] 1 K.B. 577 ; 39 Digest 531, *1441* ; 92 L.J.K.B. 553 ; 129 L.T. 146.

(16) *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63 ; 39 Digest 614, *2115* ; *on appeal* (1790), 1 Hy. Bl. 357 ; *subsequent proceedings* (1794), 5 Term Rep. 683.

C (17) *Re Shipton, Anderson & Co. & Harrison Brothers & Co.*, [1915] 3 K.B. 676 ; 12 Digest 397, *3220* ; 84 L.J.K.B. 2137 ; 113 L.T. 1009.

(18) *Falk* v. *Fletcher* (1865), 18 C.B.N.S. 403 ; 39 Digest 513, *1307* ; 34 L.J.C.P. 146.

(19) *Moakes* v. *Nicolson* (1865), 19 C.B.N.S. 290 ; 39 Digest 517, *1340* ; 34 L.J.C.P. 273 ; 12 L.T. 573.

D (20) *Dodsley* v. *Varley* (1840), 12 Ad. & El. 632 ; 39 Digest 583, *1857.*

APPEAL from a decree of the High Court of Judicature at Fort William in Bengal, in its civil appellate jurisdiction (SIR HAROLD DERBYSHIRE, C.J., COSTELLO and PANCKRIDGE, JJ.), dated Mar. 18, 1936, setting aside the orders and reversing decrees of the same court, in its original E civil jurisdiction (BUCKLAND, J.), dated July 16, 1929, and Mar. 7, 1932, respectively, in favour of the appellants. The facts of the case are set out in the judgment of their Lordships delivered by LORD WRIGHT.

Sir Robert Aske, K.C., and *W. Lennox McNair*, for the appellants, referred to *Hathesing* v. *Laing* (4), *Evans* v. *Nichol* (6), *Craven* v. F *Ryder* (7), *Kasi Persad Narain* (*Baboo*) v. *Kawalbasi Kooer* (*Mussumat*) (8), *Sewell* v. *Burdick* (9), *Howes* v. *Ball* (3), *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.* (2), *Whitehorn Brothers* v. *Davison* (10), *Cheah Soo Tuan* (*Official Assignee of the Estate of*) v. *Khoo Saw Cheow* (11), *Pope* v. *Official Assignee, Rangoon* (12), *Bhup Narain Singh* v. *Goku* G *Chand Mahton* (13), *Gobind Chunder Sein* v. *Ryan* (14), *Heap* v. *Motorists Advisory Agency, Ltd.* (15), *Lickbarrow* v. *Mason* (16).

A. M. Dunne, K.C., and *J. M. Pringle*, for the respondents, referred to *Hathesing* v. *Laing* (4), *Bhup Narain Singh* v. *Goku Chand Mahton* (13), *Whitehorn Bros.* v. *Davison* (10), *Heap* v. *Motorists Advisory Agency*, H *Ltd.* (15), *Re Shipton, Anderson & Co. & Harrison Brothers & Co.* (17), *Falk* v. *Fletcher* (18), *Moakes* v. *Nicolson* (19), *Dodsley* v. *Varley* (20).

LORD WRIGHT : The appellants in this appeal, a Japanese shipowning company, have been held liable to pay to the respondents, who are brokers and merchants at Calcutta, damages representing the value of certain consignments of jute gunny bags. Before explaining the issues in the case, it will be convenient to state in briefest possible outline the material facts and documents.

On May 4, 1926, the respondents entered into three contracts with three mills respectively for the purchase of a total quantity of 250 bales. On the same day, they sold the same quantity of 250 bales to a company called the International Export Co., Ltd., carrying on business in Calcutta, who will be referred to as the Export Co. The conditions of all the contracts were identical, the form used being the ordinary form approved by the Indian Jute Manufacturers' Association. This is the form under which the entire export business in gunnies in Calcutta is conducted. Clauses 3 and 4 of the terms and conditions are material:

> 3. Payments to be made in cash in exchange for delivery order on sellers or for railway receipts or for dock receipts or mates' receipts (which dock's receipts or mates' receipts are to be handed by a dock or ship's officer to the seller's representatives).
>
> 4. The buyers hereby acknowledge that so long as such railway receipts or mates' receipts (whether in sellers' or buyers' name) are in possession of the sellers, the lien of the sellers as unpaid vendors subsists both on such railway receipts or dock's or mates' receipts and the goods they represent until payment in full.

The contracts stipulated for delivery free alongside export vessel in the port of Calcutta. The Export Co. in due course had engaged freight from the appellants. The terms of the engagement are taken as evidenced by a document called a shipping order from the appellants' Calcutta branch to the ship's commanding officer. It was there stipulated that the goods should be sent alongside on notice, that freight was payable in Calcutta, and that the receipt of cargo issued by the ship (that is, the mate's receipt) must be exchanged for a bill of lading. On May 4, 1926, the Export Co. gave shipping instructions to the respondents, which they passed on in the same terms to the three mills. On May 17 and May 18, 1926, two of the mills sent alongside certain parcels to the Moji Maru, and the remaining quantities were sent to the Hokata Maru. These two vessels were owned by the appellants, who received the parcels in accordance with the shipping engagement between themselves and the Export Co., and issued mate's receipts as presented to them for signature by the mills. These receipts were in the following terms:

> Received on board . . . for conveyance to Kobe from the Export Co. the under-mentioned goods subject to the terms and conditions of the company's bills of lading.

These receipts were severally delivered to the mills' sircars, who had tendered with the goods a request to the steamer in the following terms:

> Please receive on board from the above mills the under-noted goods, shipping documents for which have been taken out in the name of Messrs. International Export Co., Ltd., and hand the mate's receipt to our sircar.

In three cases on the same day as the mate's receipts were severally given, and in one case on the following day, the appellants issued the respective bills of lading, describing the goods as shipped by the Export Co. and deliverable to order at Kobe, without the mate's receipts being given in exchange, but a letter of guarantee or indemnity was in each case taken from the Export Co. by the appellants. At these several dates, the respondents were not themselves in possession of the mate's receipts, which they obtained from the mills a few days later against payment. When they thus obtained the mate's receipts, they tendered them to A the Export Co., who defaulted in payment. Thereupon the respondents on May 27, 1926, gave notice in writing to the appellants that they had an unsatisfied lien or claim for the price, and were entitled to retain the relative mate's receipts, and that bills of lading must not be issued by the appellants until the mate's receipts were surrendered to them. By B that time, however, the Export Co., having the bills of lading in their possession, had resold the goods to purchasers in Japan, and had drawn bills of exchange for the price on the purchasers. These bills of exchange they had discounted with a bank (sometimes referred to in the proceedings as the Taiwan Bank, but in fact the International Banking C Corporation, a subsidiary of the National City Bank of New York), and had indorsed to them by way of security the bills of lading. On June 12, 1926, the respondents, as they could get no satisfaction from the Export Co., and as the appellants replied that they had passed bills of lading on the shipper's (that is, the Export Co.'s) own letter of guarantee and D referred the respondents to the shippers, issued their writ, claiming payment of the price from the Export Co. and damages from the appellants. In due course, the vessels, the Moji Maru having sailed on June 19 and the Hokata Maru on June 4, 1926, proceeded to their destination, and the goods were delivered at Kobe on presentation of the bills of lading. E An application, which had been made by the respondents for an injunction and interim receivership of the goods while the ships were still at sea, had been ordered to stand over till the trial.

At the trial, which took place in July, 1929, the Export Co. did not appear, and judgment went against them. The judge, BUCKLAND, J., F dismissed the suit as against the appellants. He held that the appellants could not be held liable to the respondents for issuing the bills of lading without having the mate's receipts unless they had received notice of the respondents' lien or claim before they did so. For this purpose, the written notice of May 27, 1926, was too late. He rejected the G respondents' evidence that oral notice had been given on May 14, 1926. He held on the evidence that " admittedly it was a common practice " at the port of Calcutta to issue bills of lading without mate's receipt. He curtly negatived the contention that the respondents had a special property in the goods, which was violated by the delivery at Kobe to H the bill-of-lading holders, so that the respondents were entitled to damages as in trespass or conversion.

The respondents having appealed, judgment was given by the Court of Appeal on July 22, 1930. RANKIN, C.J., who delivered the leading judgment, agreed with the trial judge that the appellants were guilty of no breach of duty in issuing the bills of lading to the Export Co., which was named as shipper in the mate's receipts. He gave his reasons for this conclusion shortly, as he had already more fully discussed the point in giving judgment in an appeal heard by the court immediately before, *Nippon Yusen Kaisha* v. *Mahaliram Ramjidas* (1). He held, however, that the respondents had a special property or right of possession in the goods, and that the notice of lien and other demands were sufficient to render the appellants guilty of conversion, for that, notwithstanding the notice and demands, they delivered the goods under the bills of lading, because, he said :

> an indorsee of a bill of lading cannot make a better title to the goods than his indorser upon the principle of purchaser for value without notice.

As, however, he was of opinion that sect. 178 of the Indian Contract Act might entitle the bank to claim as against the respondents a better title than the Export Co. to the goods, he ordered a remand to determine that issue. Ghose, J., concurred with Rankin, C.J., while Lort Williams, J., dissented.

It was held by Buckland, J., who tried the issue, that the transaction was of the most ordinary and normal kind in every way, and that there was no question, on the evidence before him, of any want of good faith, or of any circumstance that would raise any presumption whatever that the bank was acting improperly. This finding came before the Court of Appeal, which reversed the finding of the judge, and held that judgment should be entered for the respondents against the appellants for a sum to be agreed or ascertained. Derbyshire, C.J., with whom the other members of the court agreed, held that the onus was on a party seeking to rely on sect. 178 to establish affirmatively that he acted in good faith and in circumstances which were not such as to raise a reasonable presumption that he acted improperly, and that the appellants had failed to discharge that onus. The present appeal is from the judgment so entered against the appellants.

The matters to be decided in the appeal are, first, whether the appellants, in issuing bills of lading without having the mate's receipts, committed a wrong as against the respondents, and, secondly, whether, by delivering to the bill of lading holders, they converted the respondents' goods—that is, goods in which the respondents had an immediate right of possession as against the indorsees of the bill of lading, which was infringed by the delivery from the ships at Kobe. If both these questions are answered in the negative, the third question which has been dealt with by the Court of Appeal and debated before this Board does not arise.

The first issue to be determined is when, under the contract, the property passed. The sale was of unascertained goods. *Prima facie*, on such a sale, the property in the goods passes when goods answering to the contract description are unconditionally appropriated to the contract with the assent of the buyer, which in this connection does not mean expressed assent, but simply that the appropriation has been made in the manner contemplated by the parties. This *prima facie* rule may, however, be varied by the terms of the contract, or even by a reservation made by the seller in the act of appropriation. The general rule is that the property passes when the parties intend it to pass. In the present case, the sale being free alongside, the property *prima facie* passes when A the goods are appropriated by delivery alongside in implement of the contracts. It is, however, said that cl. 3 of the contract precludes the passing of the property until the price is paid against the mate's receipts or the other documents specified. That would no doubt be so if cl. 3 were not followed by cl. 4. The contract must, however, be read as a B whole. Clause 4 provides for a lien of the sellers, as unpaid vendors, on the mate's receipts, or other documents, so long as they remain in the sellers' possession, and on the goods, until payment in full. Can this be reconciled with the reservation of the *jus disponendi* which cl. 3 would import if it stood alone? That depends on the meaning to be C attributed to the word "lien" as used in regard to the goods. A common law lien is possessory, and depends on possession, but it also presupposes that the property in the goods has passed. A person cannot have a lien on his own goods. Thus, cl. 4 imports that, notwithstanding cl. 3, the property has passed when the goods are delivered alongside— D that is, placed in possession of the shipowners. The result is that the sellers have parted with both property and possession. "Lien" must therefore be used in a different sense, as meaning either an equitable lien or a hypothecation such as that discussed by this Board in *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.* (2), or the common E law right or licence to resume possession, such as that discussed in *Howes* v. *Ball* (3). The result is that the sellers had, after delivery alongside, nothing left except the equitable charge, which is enforceable only by equitable remedies against the buyers, or person taking with notice of the equity, or a licence to resume possession, which is personal F or contractual as between the sellers and buyers. In neither case was there left to the sellers a common law or possessory lien, which, if it existed, would have been a right in the nature of property, and would have supported an action in conversion or trespass. The importance of this conclusion in the present case will appear later.

G A different state of things would have resulted if the sellers had delivered the goods to the ship in their own name as shippers, so that the ship would have held the goods on their behalf. But they did not. They delivered the goods as being shipped by the Export Co., and took a mate's receipt which expressly stated the name of the Export Co. as H shippers. In this way, the ship received the goods on behalf of the Export Co., who had booked the freight from the shipowners. All that the sellers had was possession of, or a lien on, the mate's receipt. It is, however, on this fact, coupled with the terms of the challan or document delivered to the ship by the mills with the goods, and also on the course of business, that the respondents rely as justifying their first claim, which is that the issue of the bills of lading to the Export Co., without production of the mate's receipt, was a wrongful act by the appellants as against them, which deprived them of their security on the goods, and caused them damage equivalent to the full value.

The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority. It is, however, *prima facie* evidence of the quantity and condition of the goods received, and *prima facie* it is the recipient or possessor who is entitled to have the bill of lading issued to him. If, however, the mate's receipt acknowledges receipt from a shipper other than the person who actually receives the mate's receipt, and in particular if the property is in that shipper, and the shipper has contracted for the freight, the shipowner will *prima facie* be entitled—and, indeed, bound—to deliver the bill of lading to that person. So it was held by BACON, V.-C., in *Hathesing* v. *Laing* (4), a case in principle not different on its facts from the present. It was held that the indorsement of the mate's receipt did not transfer a property which overrode that given by the indorsement of the bill of lading, which had been issued without production of the mate's receipt, though the latter was held as security by the person to whom it had been issued. In that case, as in this, the person who delivered the goods to the ship took the mate's receipt describing the debtors as the shippers. No doubt if the shipowner, before he issues the bill of lading, is given express notice that he is not to issue the bill of lading without the mate's receipt, or to anyone but the person who delivered the goods, he cannot disregard that notice. Even without express notice, he may be affected by notice to the same effect by knowledge of the actual circumstances of the case. *Hathesing* v. *Laing* (4) was decided in 1873, and has been treated as good law ever since, as, for instance, in CARVER'S CARRIAGE OF GOODS BY SEA, sect. 60. Indeed, it is difficult to see what other course a shipowner in a case like this could, in the absence of notice, adopt. He is bound to deliver bills of lading for the goods to the shipper. The shipper here is beyond question the Export Co., who engaged the freight, who are owners of the goods, who are described in the document presented by the mills as the persons in whose name shipping documents have been taken out, and whose names appeared in the mate's receipts as the persons from whom the goods were received. The mills, who at the respective dates of the mate's receipts had not been paid by the respondents, might have given notice of lien on their own or the respondents' behalf, or they might have inserted the names of themselves or the respondents as persons shipping the goods and persons to whom the mate's receipts were to be given. If that were done, the appellants could not properly have issued bills of lading to the Export Co. If, however, the mills or the respondents had taken the bills of lading in their own name as shippers, they would have become liable on the bill of lading contract, and in particular for payment of advance freight. It was not till May 27, 1926, that express notice was given to the appellants not to issue bills of lading, but it was then too late to close the stable door. An attempt to prove express notice given on May 14, 1926, which would have been in time, completely failed. Various matters were relied upon as amounting to implied or indirect notice. It was said that the direction in the mills' document that the receipts were to be given to the mills' sircars amounted to sufficient notice, especially when coupled with the course of business in the trade, according to which payment is to be made against the mate's receipts, which thus constitute a sort of security. As, however, the receipt itself acknowledges shipment by the Export Co., the mere direction to give the receipt to the mills' sircar appears to be too obscure and ambiguous to countervail the clear recognition of property in the Export Co. There might be many reasons why the receipt should be given to the person who actually delivered the goods to the ship. It is admitted by witnesses on each side that bills of lading were frequently issued without mate's receipts against an indemnity. Such an indemnity is a common commercial precaution in use all over the world whenever bills of lading are issued without mate's receipts, and no sinister inference can be drawn from its being taken. It is true that the Export Co. had obtained bills of lading in several cases from the appellants against an indemnity without producing mate's receipts, and that the appellants had been complaining, and demanding delivery of the mate's receipts, but vendors must have been in some measure aware of what was being done. It is suggested that they did not wish to make trouble with the shippers, the Export Co., who seem to have been doing a large business until the crash came, about the end of May, 1926. There is no finding of any fraudulent collusion between the Export Co. and the appellants, or, indeed, any evidence of that nature.

In all the circumstances of the case, there was not only no timeous express notice to the appellants, but also no ground for imputing implied notice. The case must be regarded as one in which shipowners, who for their own protection stipulated with the shippers that bills of lading were to be given in exchange for mate's receipts, waived that provision, and without notice issued bills of lading to the named shippers and owners of the cargo. It would impose an unprecedented burden on shipowners if, in such circumstances, they were held responsible. Their Lordships agree with the conclusion of Sir George Rankin, C.J., on this issue.

The second issue is alternative. It proceeds on the footing that bills of lading were delivered to the Export Co., but, none the less, it is contended, the bills of lading in the Export Co.'s hands did not dispossess the respondents of their unpaid vendor's lien, or the lien for which they stipulated, because they continued to hold the mate's receipt, and thus they had a right to immediate possession as against the appellants, so that they were entitled to sue in conversion when their notice of May 27, 1926, and their subsequent demands for the goods, were refused by the appellants. The primary question thus is whether the respondents still possessed a right to possession, sufficient to found a claim in conversion. The appellants in reply not merely contest the contention that by the possession of the mate's receipts the respondents retained their lien, but also say that the bills of lading had been indorsed to the bank so as to put an end to the right (if any) of stoppage *in transitu*, and that they were bound to deliver the goods to the indorsees of the bills of lading, which they duly did.

On this point, Sir George Rankin, C.J., was in favour of the respondents, though, as already stated, he ordered a remand on the issue based on the Indian Contract Act, 1872, s. 178, which was then in force, though it has since been repealed in 1930. Their Lordships, with all deference, find themselves unable to concur in this conclusion in the respondents' favour. It seems to be based on two propositions: (i) that, under the contractual terms, coupled with the retention of the mate's receipts, the respondents retained a lien or immediate right to possession, which was a property interest, and not merely an equitable or personal right or licence, and (ii) that, as the indorsement of a bill of lading passed no better title than the indorser had, the indorsement and transfer to the bank passed no greater rights than the Export Co. had, so that the bank could not claim delivery from the shipowners in defeasance of the respondents' possessory title. It is, however, clear that the conclusion of Sir George Rankin, C.J., depended on his view that the respondents had a right in law to immediate possession. Indeed, it was properly conceded before their Lordships that only such a right would entitle the respondents to claim in conversion, and that a merely equitable right or contractual right or licence would not do. Their Lordships agree with Sir George Rankin, C.J., in his view that the general property passed to the Export Co., but differ from him, for reasons stated earlier in this judgment, in his view that a right at law to possession remained in the respondents. Thus the whole basis of his conclusion fails. It is true generally that a bill of lading is not a negotiable instrument in the sense that a bill of exchange is, and that the transferee of a bill of lading does not get a better title than his transferor. While that is true of title in law, however, it cannot be asserted in regard to equitable rights. The legal right given by a possessory lien can indeed be distinguished from the general legal property in a thing. This is illustrated by *Pease* v. *Gloahec* (5). That case, however, also illustrates the distinction between legal and equitable rights. The documents of title in that case had been obtained by fraud from the lawful possessor, who had not the general property which belonged to those guilty of the fraud. It was held that an indorsee from those latter persons in good faith for value got a good title, and not merely a defeasible title, and in that sense got a better title than his transferors, whose possession was defeasible. This is the general rule where the transferor has a title defeasible for fraud, but the transferee takes in good faith and for value. Another illustration of an equitable right which is defeated by the transfer of a bill of lading to a *bona fide* indorsee for value is the right of stoppage A *in transitu*. It follows from the same general rule that the equitable lien or personal licence, which, in their Lordships' judgment, was all that remained with the respondents when the goods were delivered to the ship, did not affect the transferee of the bill of lading so as to found a claim for conversion, though it might indeed found a claim for breach B of contract against the Export Co., or a claim for equitable relief against them or any assignees subject to the same equities, a category which would not include the appellants.

In respect of the matters discussed above, there is no difference in substance between English and Indian law. This conclusion renders it C unnecessary for this Board to give a decision on the issue raised on the remand under sect. 178. It seems, however, proper for their Lordships to say that, as at present advised, they would prefer the judgment of BUCKLAND, J., to that of the Court of Appeal. Even assuming that the onus of proof under the section is on the appellants, it would seem that D they discharged it by the evidence of the bank, which showed that the transaction was a banking transaction of the most ordinary and normal character. If it were necessary to look further, the presumption of good faith would complete the proof. Their Lordships are far from satisfied, however, that under the section the onus would have lain with the E defendants. There are in the section two separate provisoes. The onus of proof under the second proviso cannot, it seems, be on persons in the position of the defendants, and, if so, it would seem to follow that the onus as to the first proviso must likewise rest in the same quarter. Otherwise an anomalous result would follow. Decisions under other statutes F have been cited, but it is always dangerous to seek to construe one statute by reference to the words of another. It may well be that in this section the plaintiff who seeks to impugn what is *ex facie* a valid disposition should be held to assume the burden of showing bad faith and such other matters as the provisoes require to be established in the G particular case. Their Lordships on the whole case are of opinion that the appeal should be allowed, that the orders of the Court of Appeal should be set aside and the orders of BUCKLAND, J., restored, and that the respondents should pay the appellants' costs in the Court of Appeal and before this Board. They will humbly so advise His Majesty.

H *Appeal allowed with costs.*

Solicitors: *Waltons & Co.* (for the appellants); *Barrow, Rogers & Nevill* (for the respondents).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

HOWARD v. S. W. FARMER & SON, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **March 30, 1938.]**

Negligence—Building in course of construction—Incomplete staircase—Liability of contractors and subcontractors. A

The plaintiff was a workman engaged in building operations. The first defendants were the general contractors, and the second defendants were subcontractors engaged in putting in the staircases in a new building. At the material time, there was a ladder (provided by the general contractors) from the ground up to the second floor, but no ladder from the ground to the first floor. The subcontractors had put in a staircase from the ground to the first floor, which was incomplete B in the following respects: there was no handrail or bannisters, none of the risers were in, and one tread, the tenth from the bottom, and immediately beneath a landing half-way up the staircase, was missing. The plaintiff, almost immediately before the accident, had gone up this staircase without mishap, which he explained by saying that he went up two steps at a time, but, upon coming down, his foot slipped through the hole due to the missing tread, and he was seriously injured:— C

Held: (i) the plaintiff had no cause of action against the subcontractors, as the staircase was obviously incomplete.

(ii) the absence of a ladder from the ground to the first floor was not in effect an invitation to workmen to use the incomplete staircase.

(iii) the contractors had no power to invite or license any person to use the incomplete staircase, which could only be done by the subcontractors. D

(iv) the accident was due to the plaintiff's own want of care, and the action failed.

[EDITORIAL NOTE. This case considers in some detail the duties of contractors to provide means of access to the various floors of a building in course of construction. It also deals with the right of a contractor to avail himself of staircases E put in by subcontractors. Whilst the building is in course of erection, it is probable that no workman is entitled to assume as of course that any part is completed, and, if he makes use of such a part, it is for him by his own inspection to assure himself of the completion and the fitness of the part for the use which he intends to make of it. Where a part is obviously incomplete, as in the present case, where a staircase had neither risers nor handrail, the workman is not entitled to assume F that all the treads are there.

As to the Duty to Invitees, see HALSBURY, Hailsham Edn., Vol. 23, pp. 604, 605, para. 853; and for Cases, see DIGEST, Vol. 36, pp. 41-45, Nos. 247-281.]

Case referred to:

(1) *Kimber* v. *Gas Light & Coke Co.*, [1918] 1 K.B. 439; 36 Digest 18, *83*; 87 L.J.K.B. 651; 118 L.T. 562. G

Appeal from the judgment of Greaves-Lord, J., dated Nov. 23, 1937. The facts are fully stated in the judgment of Sir Wilfrid Greene, M.R.

H. D. Samuels, K.C., and *Felix Denny* for the appellants Courtney & Fairbairn, Ltd. H

Humfrey Edmunds for the appellants S. W. Farmer & Son, Ltd.

Tristram Beresford, K.C., and *Julian Fuller* for the respondent.

Sir Wilfrid Greene, M.R.: The action out of which this appeal arises was an action by the respondent, Mr. Howard, against two contractors who are appellants. The second defendants, Courtney & Fairbairn, Ltd., were the general contractors in connection with a certain extension which was being made to the Bromley and District Hospital. The first defendants, S. W. Farmer & Son, Ltd., were subcontractors, the particular matter with which their subcontract was concerned being the erection of an outside fire-escape staircase on the new part of the building. The plaintiff was employed as foreman by another subcontractor, whose work consisted of the installation of certain hot-water services. The accident took place on Feb. 18, 1936, and it was of this nature. The plaintiff, having had occasion to go to the first floor of the new extension, had gone up the iron staircase as far as the first floor. When he came down, he fell through a hole, which hole was due to the fact that there was no tread at that point. The tread that should have been there—or would have been there if the staircase had been finished—was tread No. 10. It was the first tread going down after the landing, which is half-way up the part of the staircase between the ground floor and the first floor. The staircase in question was being constructed under the supervision of the foreman of S. W. Farmer & Son, Ltd., Mr. Harpwood. The building has got a ground floor, a first floor, and a second floor. The part of the staircase between the first floor and the second floor had been completed, with the exception of the handrail and the bannisters. Harpwood at the time was engaged on finishing that part of the staircase which lay between the ground floor and the first floor. The stage of completion at which that part had arrived was this. All the treads appear to have been in, with the exception of No. 10. None of the rises were in, and the handrail and the bannisters were not yet there. At the time of the accident, Howard was actually inside the building, doing some work there. Whether he was working at his bench or doing some other work in connection with the supports of the staircase in the wall does not matter. He was not actually on the spot. There is one other matter of fact which must be referred to, and that is the question of scaffolding and ladders for the use of workmen working on the upper floors. There was a ladder leading from the ground floor to the second floor. Before the accident took place—or at any rate for 48 hours before the accident took place—there was also a ladder by which access could be obtained to the first floor. That ladder had originally stood against the opening into the first floor where the outside landing of the fire-escape staircase stood, and was later moved some 2 ft. away, so that it stood to the side. That smaller ladder, at the time of the accident, had been removed, and there remained only the long ladder leading up to the second floor. Accordingly, at the time when the accident took place, a person who required to come from the second floor to the ground floor could come down that ladder. If he were on the first floor, and wished to get to the ground floor, either he could go up the top part of the fire-escape staircase, which had been finished in the way I have described, and then, having arrived at the second floor, get on to the ladder, and so down to the ground floor, or he could get on to that ladder from the first floor itself, by getting over a gap variously placed by the witnesses as being 2 ft. to 3 ft., and by one as being as much as 4 ft. I think that the judge took the view that it was about 2½ ft. There was a gap, and there was a drop, because anyone on the ladder wishing to get to the first floor would, first of all, have to drop 3 ft., and then bridge this gap. Many of the witnesses said that this was awkward and risky, while other witnesses did not agree that there was anything risky in this for a man accustomed to building operations. The plaintiff unfortunately suffered severe injuries as the result of the accident. He brought his action against the general contractors and against the contractors who were putting up the staircase. The judge gave judgment in his favour against both defendants in the sum of £750. That judgment was based upon a finding of fact of the judge to the effect that, when the plaintiff went up the staircase to get to the first floor, tread No. 10 was in position, that while he was there tread No. 10 was removed by the defendants' (Farmer & Son's) workman, and that no warning was given to the plaintiff, who accordingly, when he came down expecting to find a tread there, found no tread, and fell through the hole. Unfortunately, the judge's finding of fact is not supported by the evidence, because, not only was there no evidence at all that there was a tread there when the plaintiff went up, but also the whole of the evidence was the other way. Accordingly, the judge's judgment, with all respect to him, cannot possibly stand upon the basis upon which he put it. He founded himself upon that basis, and he held that Farmer & Son, Ltd., the constructors of the staircase, knowing that the plaintiff and other workmen would be likely to use that staircase, and having, as he found, removed the tread which had been there, came under a liability to the plaintiff, on the principle of the well-known and familiar authority of *Kimber* v. *Gas, Light & Coke Co.* (1). As against the other contractors, Courtney & Fairbairn, Ltd., the head contractors, he held that they had by implication invited the plaintiff to use that unfinished portion of the staircase, that there was there a thing in the nature of a trap, and that they were responsible.

In my opinion, when the facts of the case are appreciated, the answer to the plaintiff's claim is reasonably clear. First of all, let me take the position of Farmer & Son, Ltd. They were putting up a staircase, and their job was to put it up. The staircase at that stage was unfinished, and, as between them and the other workmen upon the job, those other workmen had no right to use that unfinished staircase. The other workmen who did use it (Messrs. Farmer & Son's foreman said that he tried to stop them, but that he was not successful) were, it seems to me, quite clearly trespassing upon this staircase, which was still in the hands of the contractors, who had not completed their job. The question, therefore, is: What was the duty, if any, of Farmer & Son, Ltd., towards a workman who, without their consent, went upon a part of the work for which they were responsible? It seems to me quite impossible to hold that they were under a duty to warn such a person, in the circumstances of this case. First of all, this is not a case where a thing apparently and ostensibly complete and fit for use has been altered in such a way as to make it dangerous in a fashion not noticeable by the ordinary reasonable person. That was, of course, the case in *Kimber's* case (1). In *Kimber's* case (1), boards were taken out of a landing which, so far as any person would have suspected, or thought, was a perfectly complete and finished landing. This, on the face of it, was a staircase in the course of construction. It was quite obviously incomplete. The rises were not there, the handrail was not there, and so forth. How can it be said that a person engaged in putting up an erection of that kind is to be responsible for the fact that the work is incomplete, as is being said here ? The fact that the work was incomplete cannot have amounted in any sort of way to a trap to workmen who, without lawful authority, were using that staircase. It seems to me that the argument as against Messrs. Farmer & Son, Ltd., is completely misconceived. In my opinion, the plaintiff, upon the facts of this case, when he used that staircase, did not use it upon any invitation, express or implied, by Farmer & Son, Ltd. Farmers were under no duty to warn him that the staircase was incomplete, as in fact it was, and *Kimber's* case (1) has no application.

The case of Courtney & Fairbairn is put in this way. It is said that Courtney & Fairbairn must be treated, in the circumstances, as having invited or licensed the plaintiff to make use of this staircase. The way that argument is put is this. It is said, first of all, that it was the duty of the general contractors to provide a reasonable and safe means of access to the second floor and to the first floor. Secondly, it is said that the reasonable means of access was not provided, because it was not reasonable to expect workmen who wished to get from the first floor to the ground floor to go up to the second floor and there get on the ladder or swing over the gap I have mentioned on the first-floor level. Then it is said, thirdly, that Courtney & Fairbairn, having omitted to provide that safe and reasonable means of access, must be taken impliedly to have invited or licensed the plaintiff, and any other workman whose business took him to the first floor, to use the incomplete staircase. It seems to me quite impossible to infer, from the facts of the case, any such invitation or licence. First of all, Courtney & Fairbairn had no right to give any such invitation or licence, because, until the staircase had been handed over by the subcontractors, the head contractors had no right to invite men to go up the staircase, and no right to grant them licence to do so. However that may be, it seems to me impossible to infer, from the mere fact that the ladder leading to the first floor had been removed, that Courtney & Fairbairn are to be held to have given an invitation or licence to the men to walk up that part of the staircase. Lastly, even if it be that such an invitation or licence ought to be implied, in the circumstances of the case, what was the nature of that invitation or licence ? It was to use a staircase in course of construction, and obviously incomplete. That being so, the licensee, when actually under the licence, assuming that such a licence was to be implied, was bound, in my judgment, to exercise that degree of care that is appropriate to the use of a staircase of this character, which is obviously incomplete and under construction. Such a licensee would not be entitled to assume that the staircase, which was obviously incomplete, was complete, or that it was complete in any specified particular. Going up the staircase, he would have no right to assume that, because tread No. 1 was in position, No. 2 would necessarily be in position; or, having gone up treads Nos. 1, 2, 3, 4 and 5, he would not be entitled to assume that tread No. 6 would necessarily be there. In fact, the reasonable care which every person is expected to exercise is relative to the particular circumstances of the case, and the care which is to be expected from a person using a complete and finished staircase in a house which is finished and complete is something quite different from the care which is to be expected from a person using a construction of this kind, which is obviously and manifestly incomplete. Applying those principles, it seems to me that, when the plaintiff assumed as he did, that, when he put his foot down, a tread would be found to be there, he was making an assumption which, in the circumstances of the case, he was not entitled to make. When he went up the staircase, he went up it two steps at a time, and, whether or not he noticed as he went up that there was a missing tread, he certainly had no right to assume that a tread was there; and, when he came down, if he had exercised the care to be expected of him, this accident would never have happened.

For all those reasons, in my opinion, the judgment of the judge cannot stand. The appeal must be allowed, and there must be judgment for the defendants, with costs here and below.

Scott, L.J.: I agree.

MacKinnon, L.J.: I entirely agree.

Solicitors: *Dennes & Co.* (for the appellants Courtney & Fairbairn, Ltd.); *Blount, Petre & Co.* (for the appellants S. W. Farmer & Son, Ltd.); *Scott Duckers & Co.* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

AURE v. VAN CAUWENBERGHE & FILS.

[Court of Appeal (Greer, Slesser, and Clauson, L.JJ.), **March 30, 1938.**]

Shipping—Declaration of "quantity, port of shipment and ship's name"—Defective declaration—Whether curable by another declaration, itself defective.

The parties had entered into a standard form of contract which provided that certain particulars of goods shipped, "namely, quantity port of shipment and ship's name, must be duly declared." A declaration was given naming a wrong ship and also containing certain exceptions, so that it was therefore invalid. A second declaration, in which the correct ship was named, was therefore made. This declaration also contained exceptions, and so did not come within the requirements of the contract. A third declaration was made, but that was defective in that the port of shipment was not named. The appellants contended that the second and third declarations between them constituted a valid declaration :—

HELD : the third declaration, being itself invalid, could not be cured by importing into it the second one, which was also invalid as it contained terms not provided for by the contract.

[**EDITORIAL NOTE.** Shipping documents and other documents necessary to the perfecting of a sale of goods must be such as are specified in the contract, or, where there is no specification, such as are customary. It is essential that they should be in proper form, and not inconsistent with the contract. A declaration in respect of the terms here in question—i.e., port of shipment, ship's name, and quantity to be shipped—often has to be made at very short notice, and sent by the most rapid method of communication. It follows, therefore, that such declarations are often quite informal. In the present case, the point was reserved whether such a declaration could be made orally instead of in writing. The main issue in the case was whether two invalid declarations could be read together to make a valid one, which is held not to be the case.

AS TO SHIPPING DOCUMENTS, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 226, 227, para. 393 ; and FOR CASES, see DIGEST, Vol. 39, p. 547, Nos. 1564-1569.]

APPEAL from a decision of GODDARD, J., dated Oct. 29, 1937.

The facts of the case are set out in the judgment of GREER, L.J.

J. Scott Henderson for the appellants.

Rodger Winn for the respondents.

GREER, L.J. : This is an appeal from a decision of GODDARD, J., on a case stated in the form of a final award. I have come to the conclusion that we ought not to disturb the judge's decision, because we agree with it.

In anything I say, it must not be taken that I have formed any final opinion, either as to whether there may not be a declaration in several documents or as to whether there may not be a declaration made orally instead of in writing. I think that it would be extremely difficult for business to be carried on in relation to c.i.f. sales if oral declarations were to be permissible. However, it is not necessary to decide that, and I do not decide it, so far as my judgment is concerned in the present case.

The contract between the parties was by letter. They are both French companies, but they agreed to bind themselves by a form of contract which is an English contract, a contract which has been adopted by the Liverpool Seed, Oil, Cake and General Produce Association as a convenient way of putting in detail the contract into which they had entered. They first of all made a contract in writing, which is contained in the correspondence. It says that the sale is a sale of 100 tons of fine palm kernels of a particular description, c.i.f. Marseilles, March/April shipment from origin (that is, from the place of origin) :

Payment : net cash against documents on arrival of the steamer or steamers

> for 100 per cent. of the provisional invoice. Allowance or rebate to be made in accordance with Liverpool contract.

That is a letter from the sellers to the buyer. The buyer replied on Feb. 15, 1937 :

> I duly received your confirmation of sale No. 6039 for the 100 tons of fine palm kernels, which I bought of you on the 12th instant, through the intermediary of [the agent mentioned]. I am in agreement with you, it being understood, however, that the mention : " Goods accompanied by the certificate of origin " must form part of this contract and that the conditions under which business is concluded are " all conditions of Liverpool contract No. 22A, without any other particular condition."

That is a stipulation that the contract between these two French firms is to be that which is contained in the condition in No. 22A of the Liverpool contract without any addition thereto, and that the letter of Feb. 15 from the buyer was accepted by the sellers. There was a contract for the sale of 100 tons of palm kernels c.i.f. Marseilles, subject to the terms of the Liverpool contract. That contract provides as follows in para. 9 :

> Particulars of the kernels, namely, quantity port of shipment and ship's name, must be duly declared. If declaration be not made until after the arrival of the steamer, any extra expense incurred thereby shall be for account of the seller. Each declaration or tender shall be treated as a separate contract.

That shows they regarded the declaration and a tender as equivalent terms :

> Each declaration or tender shall be treated as a separate contract.

It was no doubt put there in order to enable the sellers to ship possibly part of the 100 tons on one vessel and part on another vessel, and to make a declaration with regard to the cargo shipped on each of the two vessels, or it might be more than two vessels.

> Seller shall be deemed to have made a default in declaring shipment if the goods contracted for are not declared within six weeks of the last day allowed for shipment. Contracts or declarations made on cable advices shall be subject to the errors of the cable companies only.

What happened after the contract had been arranged in that way was this. First of all, there was a declaration on Mar. 16, 1937, in writing, as almost all such commercial documents are. It is in these terms :

> In execution of our confirmation No. 6039 . . . we name you, save telegraphic or other errors, the steamer Anfora, or any other in its place, as carrier.

They add to the terms, which they were not entitled to do, the words which said " save telegraphic or other errors," which would include errors made by the telegraphing sellers as well as errors made by the telegraphing agent or company, and they also add the words " the steamer [named], or any other in its place," which is not a condition that they were entitled under the form of the contract to add. That was undoubtedly a bad tender, or a bad declaration of tender. On Mar. 16, they said :

> It is in error that we have indicated the s.s. Anfora in our cable of the 8th and letter of the 12th. The s.s. Anfora comes from the North and is proceeding to the Cape. We will ship per the s.s. Isonzo of the same company, she will arrive at Duala on the 18th in the morning. As we wrote you, we shall forward per the steamer indicated the aggregate of the palm kernels in stock at Duala.

There they mention the Anfora. That is a letter dated Mar. 16. Pursuant to that, on Mar. 24, they sent a declaration which is in these terms:

> Declaration cancelling and replacing the one dated Mar. 16, 1937. In execution of our confirmation No. 6039 . . . we name you, save telegraphic or other errors, the steamer Isonzo or any other in its place, as carrier of . . .

That declaration was subject to exactly the same faults as was the first declaration, and was not good, though it did mention the port of shipment. That again was a bad declaration, and not in accordance with the contract. Then, on Apr. 14, they made a further declaration, and wrote a letter on the same date. The letter is in these terms:

> We beg to acknowledge receipt of your letter dated 7th instant, and regret to say that we cannot agree with the point of view set forth therein.

That was a letter refusing to accept the declaration.

> We have no cognizance of your own buyers, but must solely keep to the agreements reached between you and ourselves. (2) The text of our declaration evidently does not correspond with the wording of the Liverpool contract, as it unquestionably contains reserves; it rested with you to refuse it immediately on receipt; this was your right, but, as you did not do so, you have to submit to the consequences.

That means that they had to take the rest of the declaration as good, although it was quite clearly not in accordance with the contract. It had never been accepted by them, except in the sense that it had not been rejected immediately. Unless the failure to reject it immediately is an acceptance, there was no acceptance. It goes on:

> Either you accept our declaration of the Isonzo or you must consider our former declarations [that is, both of them] as null and void on account of insufficiency; as you did not do so, we repeat, you must submit to the consequences arising out of the text of our declaration.

That must refer to the first declaration. Then it goes on:

> In order that there be no possible ambiguity whatever, we are sending to you a regular declaration conformable to the stipulations of the Liverpool contract and trust you will respect your engagements by paying the documents. (5) We wish to make it clear that should you fail to respect your engagements, that is to say, pay the documents, this would compel us to give this matter a litigious turn, but we trust, on the contrary, that it will terminate in a friendly way and that on presentation of the documents by Messrs. A. Raffin, you will honour them by your settlement.

Then on the same date they sent a last declaration:

> In accordance with contract 22A of Liverpool, we beg to inform you that we name you the s.s. Isonzo for the 100 tons which we owe you under our abovementioned sale. We would remind you that our agents at Marseilles are Messrs. A. Raffin & Cie., 27 Cours Lieutaud, Marseilles, who will hand you the documents on steamer's arrival and to whom kindly pay the amount of our provisional invoice.

That is an absolutely incomplete declaration. By itself, it would not be a declaration at all, because it does not contain the particulars required by the contract, and it cannot be put right by importing into it a declaration which was already invalid, because it contains terms which were not provided for by the contract. Although it might be possible, in some circumstances, to read two documents together as containing the declaration, notwithstanding the fact that that would be extremely inconvenient for people who have to sell documents. Assuming that there was a declaration in two documents, there cannot be a declaration contained in one document which is wholly inadequate and insufficient by importing it into another document which is objectionable because it contains matter not in accordance with the contract. For these reasons, which, I think, are in effect the reasons GODDARD, J., gave in the only note we have of his judgment, this appeal must be dismissed with costs. A

SLESSER, L.J.: I am of the same opinion. I can state my reasons very shortly, more particularly as GREER, L.J., has stated the facts of the case.

By cl. 8 of the contract it is provided: B

> Particulars of the kernels, namely, quantity port of shipment and ship's name, must be duly declared.

I read that word "duly" there to mean that *debito modo* there must be properly given particulars of the quantity (with which we are not here concerned), port of shipment and ship's name. The first two declara- C tions were defective in that, though they stated the port of shipment, the ship's name was stated with reserve, and therefore did not comply with the requirements of cl. 8. The third declaration was defective in that, while it stated the ship's name clearly and without reserve, it omitted to state the port of shipment, so that the declaration, therefore, taken by D itself, was bad. I agree with the appellant to this extent, that, on the first declaration being bad, and therefore being no declaration, it may well be that he was entitled to submit a second valid declaration, but that he never did. It is now argued that he may cure the defect of the third declaration, which is the only declaration on which he can now really E intend to rely, and which omits, as I have said, the port of shipment, by obtaining the port of shipment from the second invalid declaration, and by reading it into the third. Like GREER, L.J., I wish to express no concluded opinion as to whether or not there may be circumstances in which it is proper to gather a declaration from one or more documents, F or from documents and an oral declaration. I am clear that in this case the obligation duly to declare must require in the "duly declare" the particulars required in cl. 8—namely, both the port of shipment and the ship's name must be supplied, and in no single declaration which has been produced are both those requirements satisfied. I am G of opinion that cl. 8 has not been satisfied, and that therefore this appeal must fail.

CLAUSON, L.J.: I agree, and I have nothing to add.

H

Appeal dismissed with costs.

Solicitors: *Hyman Isaacs, Lewis & Mills*, agents for *Herbert J. Davis, Berthen & Munro*, Liverpool (for the appellants); *Layton & Co.* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

SOCIÉTÉ BELGE DES BETONS SOCIÉTÉ ANONYME *v.* LONDON & LANCASHIRE INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Porter, J.), **February 25, 28, March 1, 2, 14, 1938.**]

A *Insurance—Marine insurance—Total loss—Seizure by peoples—Confiscation by workmen—Acts of workmen subsequently recognised by de facto government.*

The plaintiffs were, under a contract with the Spanish government for the authorities at Valencia, engaged in carrying out certain works in the harbour there. For this purpose, they had there certain vessels and their appurtenances which were insured with the defendants. The B government of Valencia after July, 1936, when the revolution in Spain commenced, passed, for practical purposes, into the hands of the Popular Executive Committee. The workmen employed upon the works in the harbour feared that the property and the business of the plaintiffs would be confiscated by the Popular Executive Committee, and determined to take them over themselves. The representative of the plaintiffs at Valencia resisted this till resistance was no longer possible, when he C was forced either to make his way to France or be killed by the workmen. The plaintiffs then claimed for a total loss, and notice of abandonment was tendered but refused. It was found as a fact that the workmen had the support of the Popular Executive Committee, who were, at the material time, both the *de facto* and the *de jure* government of Valencia :—

D HELD : this was a seizure by peoples and a loss by restraint of peoples, and therefore a constructive total loss, since recovery within a reasonable time was unlikely.

[**EDITORIAL NOTE.** This case applies the doctrine relating to arrests, restraints or detainments of kings, princes, or peoples to the peculiar happenings in Spain at the time of the revolution in 1936. In some parts of the country, the workers E practically took control, and confiscation of property became a common happening. Such confiscation was here held to be a loss by restraint of peoples.

AS TO SEIZURE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 315, 316, para. 440 ; and FOR CASES, see DIGEST, Vol. 29, pp. 216-219, Nos. 1729-1750.]

Cases referred to :

F (1) *Polurrian S.S. Co., Ltd.* v. *Young* (1913), 109 L.T. 901 ; 42 Digest 642, *467* ; *on appeal,* [1915] 1 K.B. 922.

(2) *Nesbitt* v. *Lushington* (1792), 4 Term Rep. 783 ; 29 Digest 218, *1740.*

ACTION claiming under a policy of marine insurance in respect of the loss of certain vessels and their appurtenances at Valencia at the time G of the Spanish revolution. The facts are fully stated in the judgment.

H. U. Willink, K.C., and *W. L. McNair* for the plaintiffs.

Sir Robert Aske, K.C., and *Cyril T. Miller* for the defendants.

PORTER, J. : This is an action by two Belgian companies and one H Spanish company against the London and Lancashire Insurance Co., Ltd. The claim is a claim under a policy of marine insurance in respect of the loss of certain vessels and their appurtenances, which belonged to one of the three companies, or two of the three companies, or all of the three companies. So far as I have been informed, I cannot determine the exact position of the property. The history of the matter is as follows. It was desired, either by the Spanish government or by the Valencia authorities (again I do not know which), to improve the harbour at Valencia. The matter was put up to contract, and the contract was obtained by the two Belgian companies, who formed, for the purpose of carrying out the works, the third or Spanish company, which I shall call the Iberica.

For the purpose of the works, there were three places at which representatives of the plaintiffs were stationed. First of all, at Valencia itself, where Mr. Ceresa was in charge, then at Vinaroz, a place further up the coast where Mr. Beaulieu was in charge, and finally some work was being done at a place known as El Tete, which was a little inland, and I think a little south of Valencia.

On July 18, 1936, General Franco began his revolution in Spain, and civil war began at Valencia. There was a garrison in the barracks at Valencia, which, it was feared by the populace, would join with General Franco, and on July 20 there was a general strike. The controlling power, if one may so call it, in labour matters, I think in Spain generally, but certainly in Valencia, was mainly centred in three syndicates or unions, which may quite shortly be called the U.G.T., who were the communist section, the C.N.T., who were the syndicalist section, and the F.A.I., who were the anarchist section. There was also a large number of local syndicates, some of which were affiliated and some of which were not. As soon as the revolution broke out, these bodies armed their adherents and took control of the city, in so far as one can say there was any control at all. However, in the face of a military revolution, considerable disorder reigned, and acts were done which in the ordinary course would have been avoided, and power was assumed by those who had the force to exercise it, without at that time any authority from the central government. Enemies were murdered, shot, or otherwise disposed of, and prisoners were released, and advantage was taken of the confusion to exercise private revenge and practise other criminal activities. Meanwhile, the populace proceeded from place to place in cars, fully armed and ready to shoot at any moment. Gradually, however, that state of affairs became somewhat more orderly. The garrison was defeated, the immediate threat of military government ended, and a body called the Popular Executive Committee formed itself, with the assent and assistance of a gentleman known as the governor, to whom I shall have to refer later, and formed itself, as is vividly said in one of the documents, "from the very entrails of the people." The Popular Executive Committee was a body which exercised the function of government in Valencia. The central government, realising the danger of disorder, on July 22, 1936, appointed a delegate commission, which has been referred to as the Barrios commission. In fact, so far as Valencia was concerned, this commission never functioned as a governing body, but left the Popular Executive Committee in control, and the decree creating the commission was annulled on Oct. 14, 1936.

Meanwhile, the workers, who had been hoping for confiscation of businesses and property in their favour, at least since the elections of Feb., 1936, if not before, were encouraged to think that the time for realising their hopes was at hand, if it had not already come, and numerous businesses were taken over either by the Popular Executive Committee A or by their own workmen.

The position with regard to the plaintiff company is set out in a report made by Mr. Ceresa on Sept. 14, to his employers. I may say that I accept Mr. Ceresa's evidence throughout. He was a brave and tactful man, who treated his workmen with that respect and courtesy which the B Spaniard appreciates, but by no means gave way to their demands, if he thought that they were not justified, in so far as he could resist them. His tact and courage enabled him to remain on the spot until Sept. 4, 1936, or a few days after that, but I am satisfied that he was in personal danger throughout his stay, and that, though he might persuade his C people, he could not command them. As I have said, the workmen were hoping for confiscation, and were determined to have it. They worked well for themselves, and with the aim that the property of their businesses should become theirs. Eventually, on Sept. 2, 1936, in order to avoid confiscation by the unions or the Popular Executive Committee, and D fearing lest their employment and the pay attached to it should be taken from them, they determined to take over the property and the business of the plaintiff companies.

As early as Aug. 18, a workmen's management committee had been formed, which notified Mr. Ceresa that he must abstain from any act of E management without informing them. This body gradually arrogated to itself more power as time went on. On Sept. 2 there was a meeting of representatives of that body and Mr. Ceresa. The body was headed by a Mr. Ricacho, who was a somewhat violent supporter of the workmen's cause. The document in which the workmen asserted their rights F is to be found in the documents in evidence. At that meeting of Sept. 2 the workmen indicated that they proposed, as I have said, to take over the works and the property, lest they should be taken over by some other body and the workmen should not be enabled to enjoy the pay and the work of the harbour works. They told Mr. Ceresa that they had to G find an excuse for taking over, and the excuse which they intended to put forward was that he had gone to Madrid and elsewhere without their permission. That they knew to be untrue, but, none the less, whatever excuse they might put forward, they had made up their mind that the works and the property should be theirs. Thereupon Mr. Ceresa went H first of all to the governor, Colonel Arin, and endeavoured to defeat the end of the workmen's committee, but was sent by him to a Senor Tejon, who was the gentleman in charge of the question of the taking over of businesses by the workmen or others. When, on Sept. 4, Mr. Ceresa visited Senor Tejon, that gentleman would not deal with him alone, but sent him away telling him to come back with a delegation from the workmen's committee, and at 6.30 p.m. on Sept. 4 Mr. Ceresa and the delegation attended before Senor Tejon. At that interview, the reasons and the determination of the men were put forward, and it was plain that they intended there and then to take possession of the works and of the plaintiffs' property. They made it sufficiently plain that Senor Tejon was not inclined ultimately to resist their determination, but, as he desired to put the matter into due form, he asked, or suggested, that Mr. Ceresa should go back to the works and stay for a time, but not interfere, and he ultimately received a document signifying that the seizure had taken place. Thereupon the delegates, as representing the workmen, declared that Mr. Ceresa should not come back, and threatened that, if he did come back, they might treat him as they might have treated him at an earlier stage, by taking him out and shooting him, or otherwise disposing of him. In those circumstances, Mr. Ceresa did not think it worth while to attempt to go back, and indeed he would have been very ill-advised to do so. With regard to the document which was to be supplied by Senor Tejon as a mere formality, Mr. Ceresa thought, and indeed I think rightly, that he had done all he could to preserve his employers' property, and that to save his own life or to ensure his life it was well that he should leave, and that, even if he did stay, he could do no more to preserve the property.

Having sailed for France—he was a Frenchman—he furnished a report of Sept. 14, 1936, and the plaintiffs, having received it, on Oct. 6 claimed as for a total loss. The claim was passed on to the representatives of the defendants, and notice of abandonment was tendered. The notice of abandonment was refused, and the representative of the underwriters finished by saying:

> We suggest to you that you ask your clients also to obtain the intervention of the Belgian Ministry of Foreign Affairs for the protection of their interests.

Just that I may finish that part of the story, the plaintiffs asked that they should be put in the same position as that in which they would have been if they had issued a writ, but that was refused, and ultimately the writ was issued on Nov. 10.

Meanwhile, acting upon the suggestion of the underwriters contained in their letter, the plaintiffs did approach the Minister of Foreign Affairs, and the letter will be found in the documents in evidence. They made a further application on Oct. 16, and had further communications with the government department on Dec. 4, 1936, and June 12 and June 17, 1937.

Meanwhile, the underwriters, on their side, took no steps. So far as the plaintiffs knew, that was the position at the time of the issue of the writ, and indeed it was the position, so far as they knew, at the time when the trial of the action began.

In addition to the events which had been brought to their notice in this way, the plaintiffs also had ascertained that certain regulations or decrees had been made by bodies purporting to exercise authority in

Valencia. Before dealing with those decrees, however, I ought to say a word about the method of confiscation adopted in Spain. On this I have had the advantage of the evidence of Senor Colom, a member of the Spanish bar, whose evidence was uncontradicted, and whose evidence I accept.

The Spanish word used is *incautacion.* It was originally used legislatively of the expropriation of the property of the late King of Spain without compensation, and has since been commonly used. It means the taking of possession by a competent tribunal or authority. It is final, has some suggestion of punishment, and none of return. When a temporary taking is intended, the word *occupacion* is employed.

The government of the province of Valencia before the outbreak of civil war was conducted by a governor representing the central government, with a provincial deputation and a city council under him. At all material times, Colonel Arin was the governor, and before Aug. 24, 1936, he had assisted in forming a body called the Popular Executive Committee under his authority. According to Senor Colom, the Popular Executive Committee, which was originally the *de facto* government of Valencia, had become the *de jure* government, inasmuch as it had been established by the Barrios commission on Aug. 4, 1936. On that date, Aug. 24, 1936, the Popular Executive Committee issued a decree or regulation dealing with *incautaciones.* Art. 2 is material:

> The labour and unemployment delegation will continue to deal, as heretofore, with applications for the *incautacion* of industries and businesses in accordance with the regulations as to validity, registration, guarantees, presentation of applications in triplicate, etc. contained in its orders of 20th and 22nd instant. . . . All *incautaciones* effected up to date, which have been authorised in any way by the Popular Executive Committee will be considered as having been legalised; nevertheless statements of them must be drawn up, following the same rules as are decreed by the present order, for the purpose of registration and co-ordination in the respective departments. *De facto incautaciones* which have not yet been regularised will be so regularised as soon as possible, in the same way as those carried into effect hereafter all of them being made to conform to the above rules.

While that decree still purported to be in force, the Popular Executive Committee on Nov. 6, 1936, granted an application for the *incautacion* of the Iberica Company. This grant is to be found in the archives of the Ministry of Finance, and was so found by Senor Colom on Feb. 3, 1938, when he visited Valencia. He went first to the harbour at Grao, where he was met by someone who was apparently a member of the workmen's committee, and was handed a copy of the decree signed by four members of that body. Senor Colom afterwards proceeded to the Ministry of Finance, and there saw Senor Tejon, and with his help found the document. He brought over with him a certified copy, which he had compared with the original. In this document there is an inventory of the property of the Iberica which had been taken over, but Senor Colom did not examine it, and we do not know exactly what property was included.

It is said by Senor Colom that the *incautacion* of the Iberica and the property used by it was legal by the law of Spain, because the act of *incautacion* was carried out under the law of public order. He further stated that art. 44 of the constitution did not apply, and that therefore the confiscation was permissible even without an adequate indemnity. He added, however, that he recognised that the seizure of the property now under consideration was not absolutely legal. I think that his reason for this qualification is that the sections of the law of public order which were produced did not in terms authorise the seizure of private property in the conditions existing at Valencia. However this may be, there was in fact a seizure authorised by the Popular Executive Committee and confirmed by the Spanish government, whether lawfully or unlawfully—a seizure which has been persisted in, and which the government has supported, and apparently intends to support.

By Dec. 1 and Dec. 4, 1936, conditions had become more orderly in Valencia, and on those dates the Popular Executive Committee issued certain fresh regulations for the effecting of *incautaciones*. They provided that one of its departments should continue to deal with applications for *incautacion* of industries and businesses, and that all *incautaciones* effected up to date and authorised in any way by the Popular Executive Committee should be considered as legalised, and that *de facto incautaciones* would be legalised as soon as possible. By art. 8 of that document it is provided that:

> Foreign enterprises will be respected, unless the Council of Economy decides to the contrary, in which case they will be collectivised by applying the foregoing rules, with this difference only—that the compensation will represent the total capital, and will be paid in cash.

Senor Colom asserted, and I accept his evidence, that that had application only to future *incautaciones*, and that in fact a number of foreign companies had already suffered *incautacion*, and that *incautacion* was persisted in without compensation. Art. 11 provided for the temporary continuance of the workmen's control committees, which had been already legalised, and provided for their functioning in the same manner so as not to create difficulties in the necessary movement of capital for the payment of wages and the normal prosecution of business.

Finally, on Dec. 25, 1936, a fresh decree was promulgated, a decree of the republic. It says:

> It is the duty of the present government to realise the spirit and efficacy of the bodies which have arisen spontaneously from the very entrails of the people, and to give them an authority and a channel which may serve to co-operate in the common labour and to secure a victory. Among these bodies there are several which arose under the name of councils in some provinces of Spain; one of them, that of Valencia, which has applied that the functions of the provincial deputation should be discharged by the new popular institution.

The decree then provides for the discharge of these popular bodies, and the appointment in their place of provincial councils, and for the method by which the election or appointment to the provincial councils should be made, and provides that, from that time when the provincial councils are founded, the bodies hitherto exercising the powers should be superseded by the new provincial organisations. Those bodies, I am told, were appointed immediately, and immediately took the place of the authority which previously subsisted in the Popular Executive Committee. Those bodies, however, were appointed after the date on which the action was brought, and after the date which I have to consider, and, so far as I have been able to ascertain, they did not interfere with the acts previously done by the Popular Executive Committee. They became, it is true, the authoritative governing body as from the date of the passing of the decree, but they did not interfere with the activities of the bodies in control before that date.

As I have said, the writ was issued on Nov. 10, 1936, and the plaintiffs in those circumstances claim that there was a loss either (i) by restraint of peoples, or (ii) by persons taking part in labour disturbances or riots or civil commotions, or arising from any other malicious act whatsoever.

Some discussion took place as to whether the loss was an actual total loss or a constructive total loss. In a case in which notice of abandonment has been given, and having regard to my view of the facts, I do not think it necessary to decide this point. In the present case, the suggested seizure took place on Sept. 2, 1936. The writ was issued on Nov. 10, 1936. After the seizure, and before the issue of the writ, the decree of *incautacion* took place on Nov. 6.

It is clear from *Polurrian S.S. Co., Ltd.* v. *Young* (1) that to constitute a constructive total loss it must be proved that the assured was unlikely to recover within a reasonable time. If the seizure was a seizure by peoples, in my opinion, in any view of the facts, by Nov. 10 the recovery of the vessels insured was unlikely, and certainly unlikely within any reasonable time. The question then is : Was there a seizure by peoples ? It was undoubtedly a seizure, but it is established law that a seizure by the governing power of the country is necessary in order that the assured may recover under this head : *Nesbitt* v. *Lushington* (2). No doubt the seizure was originally by the workers of the Iberica, and took place in order that they might do the work, and receive the wages payable on that work, to the exclusion of the general members of the trade unions and the public generally. However, in this action they had the support of the Popular Executive Committee, who, as Senor Colom stated, and as I find, were the *de facto* and *de jure* government of Valencia at this time, and, rightly or wrongly, legally or illegally, the central government permitted them to govern Valencia in its name, and to exercise the right of confiscation. Moreover, the central government has recorded in its archives the fact of the *incautacion* of the Iberica, and the property has remained in the same possession ever since.

It is said that all that was taken over was the business, and that the ships, which were partly the property of the other plaintiffs, are not proved to have been officially taken over. Some inventory of property taken appears to have been made, though Senor Colom did not know what it contained; but the insured property in fact has remained in the possession of the workers ever since Sept. 2, 1936. Senor Colom on his visit found it still in their possession, and I think that I am entitled to draw the conclusion that the whole of the property, whether it belonged to the Belgian companies or to the Iberica, was both actually taken over and retained by the workers, and that no distinction was made between the two classes of property. Having regard to these findings, I hold that there was a loss by restraint of peoples. That opinion is decisive of the case, and I do not propose, therefore, to express any opinion as to the alternative claim for loss by persons taking part in labour disturbances or riots or civil commotions, or from any other malicious act whatsoever. The argument is open to the plaintiffs, in case my view as to loss by restraint or seizure is wrong, but I do find as a fact that, although no actual violence was used by the workers on Sept. 4, 1936, at the meeting with Senor Tejon, yet there was always an underlying threat, and on that date an actual threat of violence which might well have been used had Mr. Ceresa attempted to exercise any control at the works, or even to return to them, and before which even a courageous man would wisely have withdrawn. In those circumstances, I give judgment for the plaintiffs for the sum claimed.

Judgment for the plaintiffs for £5,359 10s. with costs.

Solicitors: *Wm. A. Crump & Son* (for the plaintiffs); *Ince, Roscoe, Wilson & Glover* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

ODHAMS PRESS, LTD. *v.* COOK (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **March 24, 25, 1938.]**

Income Tax—Deductions—Subsidiary company—Trading account between principal and subsidiary company—Loss of subsidiary company written off trading account—Whether money wholly laid out for trade of principal company—Income Tax Act, 1918 (*c.* 40), *Sched.* D, *Cases* I *and* II, *r.* 3 (*a*), (*e*), (*f*), (*i*).

The appellant company had a number of wholly controlled subsidiaries for which it did printing work. One of these companies, C.F., Ltd., during the year 1933-34 made a loss upon its trading operations of £2,927. The charge for printing during that year was £10,118, and the appellant company wrote off £2,927 from that sum and contended that that sum of £2,927 was a proper deduction against profits. The Crown contended that the sum of £2,927 had no specific relation to the sum of £10,117 and that it was in fact capital put into the subsidiary company to support it:—

HELD: the sum of £2,927 was capital put into the subsidiary company to support it, and was not wholly laid out for the purpose of the appellant company's trade. It fell, therefore, within the prohibitions of Sched. D, Cases I and II, r. 3 (*a*), (*e*), (*f*), (*i*).

[**EDITORIAL NOTE.** No deduction is allowable in respect of capital employed in trade. The present case goes a step further than the previous decisions, since the principal company had a running trading account with the subsidiary. The money said to be advanced as capital to the subsidiary was sought to be treated as the writing off of a bad debt on the trading account. This contention was rejected.

AS TO CAPITAL SUMS ADVANCED TO SUBSIDIARY COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 160, 161, para. 327; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 242-252.]

Cases referred to:

(1) *Noble (B. W.), Ltd.* v. *Mitchell* (1926), 43 T.L.R. 102; Digest Supp.; 11 Tax Cas. 372.

(2) *English Crown Spelter Co., Ltd.* v. *Baker* (1908), 99 L.T. 353; 28 Digest 48, *250*; 5 Tax Cas. 327.

(3) *Marsden (Charles) & Sons, Ltd.* v. *Inland Revenue Comrs.* (1919), 12 Tax Cas. 217.

(4) *Inland Revenue Comrs.* v. *Huntley & Palmers, Ltd.* (1928), 12 Tax Cas. 1209.

APPEAL by way of case stated by the commissioners for the special purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully stated in the judgment.

The Income Tax Act, 1918, Sched. D, Cases I and II, r. 3, provides as follows:

> In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation . . . (*e*) any loss not connected with or arising out of the trade, profession, employment or vocation; (*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation . . . (*i*) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad. In the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debt shall be deemed to be the value thereof . . .

J. Millard Tucker, K.C., and *Frederick Grant* for the appellants.

The Attorney-General (*Sir Donald Somervell, K.C.*,) and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: In this case, the appellant company is a company which carries on the business of printing and publishing a number of papers and periodicals. It has a number of wholly controlled subsidiaries, one of which subsidiary companies is a company called Coming Fashions, Ltd. The appellant company does printing work for Coming Fashions, Ltd., and charges to Coming Fashions, Ltd., the ordinary trade prices for that work, as it does to its other subsidiary companies. Coming Fashions, Ltd., has, during recent years, and during the year in question—1933-34—made a loss on its trading operations, and the amount of that loss in 1933 to Dec. 31, 1933, was £2,927. The amount charged by the appellant company to Coming Fashions, Ltd., for the work done by the appellant company was £10,118. In the appellant company's accounts, the amount of the loss of Coming Fashions, Ltd.—namely, £2,927—was written off, and the question is whether that sum of £2,927 is admissible as a deduction from the profits of the appellant company for the year in question for income tax purposes.

It was contended on behalf of the appellant company that it was deductible, because it was in truth and in fact a reduction made by the appellant company to Coming Fashions, Ltd., of the sum of £10,118 charged to them, and that therefore the receipt which the appellant company had from Coming Fashions, Ltd., was not £10,118, but £10,118 less £2,927. It was therefore contended that the sum of £2,927 was not a loss of capital withdrawn from the appellant company's trade, that it was wholly and exclusively laid out for the purposes of the appellant company's trade, in so far as it could properly be said to be a disbursement, and, lastly, that, if the debt of Coming Fashions, Ltd., was to be regarded as a debt, it was a bad debt to the extent of £2,927. The primary argument which was presented on behalf of the appellant company by Mr. Tucker was that the £2,927 was a reduction of the amount charged by the appellant company, and that therefore the whole amount of the original charge—£10,118—was not a receipt for the purpose of arriving at the appellant company's income.

On behalf of the Crown, it was contended that it was not a rebate, nor a release, nor a reduction, because that was not in fact what was done, that the original charge of £10,118 created a perfectly good debt, and the sum of £2,927 was not a reduction which had any specific relation to that debt, and that, in truth and in fact, upon the evidence which was before the commissioners, the reality of the transaction was that the appellant company were really putting money into their subsidiary company for the purpose of supporting that subsidiary company. Secondly, it was contended for the Crown that another way of looking at the matter was that the sum of £2,927 was not wholly and exclusively laid out for the purpose of the appellant company's business, but was laid out substantially for the purpose of Coming Fashions, Ltd.'s, business, and for the support of that business. On both of these aspects of the argument for the Crown, my attention was drawn to evidence given by Mr. Ward, a director of the appellant company, who said that the appellant company could not, for business reasons, allow any one of its subsidiary companies to fall into such a position that it could not pay debts due to other persons, and that the appellant company was compelled, for business reasons, to write off losses sustained by its subsidiaries, and did so by reducing the amounts which had been charged by it against the subsidiaries for work done on trading account. It was contended that that evidence showed quite clearly that the expenditure was not wholly and exclusively for the purposes of the appellant company's business, but was partly for the purpose of Coming Fashions, Ltd.'s, business. Lastly, it was contended that the only way in which the sum could properly be deductible would be if it were a sum written off as a bad debt or a doubtful debt, and that had not been done. It had never been treated as a bad or doubtful debt, and the fact that it was the amount of Coming Fashions, Ltd.'s, loss for the whole year shows that it was not being valued as a bad or doubtful debt.

It was agreed on both sides that, if the sum was a sum of money which was put into a subsidiary company as an advance or as capital, it could not be deducted. My attention was drawn by Mr. Tucker to a number of cases—*Noble* (*B. W.*), *Ltd.* v. *Mitchell* (1), *English Crown Spelter Co., Ltd.* v. *Baker* (2), *Marsden* (*Charles*) *& Sons, Ltd.* v. *Inland Revenue Comrs.* (3), and *Inland Revenue Comrs.* v. *Huntley & Palmers, Ltd.* (4). The *Huntley & Palmers'* case (4) was relied upon by the Attorney-General as being in point in the present case, and what ROWLATT, J., held there was that, although the form of the transaction was a purchase by Huntley & Palmers from its subsidiary company of tinned goods at the figure which had been paid for the tinned goods by the subsidiary company, and a subsequent writing off by Huntley & Palmers of the difference between that figure and the market value at that date of the goods, the reality of the transaction was that Huntley & Palmers had put that difference into the subsidiary company for the purpose of supporting it. The Attorney-General contended that that case was closely analogous to the present, and that the commissioners were perfectly entitled to decide that in this case the reality of the transaction was that the £2,927 was a sum of money which was paid by the appellant company for the purpose of supporting the subsidiary company, Coming Fashions, Ltd.

I am of opinion that the contentions of the Crown are correct, and that the decision of the commissioners in this case was correct, that this was money which was put into the subsidiary company for the purpose of supporting the subsidiary company, and was not wholly and exclusively laid out and expended for the purposes of the company's trade, but was in part laid out for the purpose of Coming Fashions, Ltd.'s, trade, and it falls within the prohibitions of Sched. D, Cases I and II, r. 3 (*a*), (*e*), (*f*), (*i*). I therefore dismiss the appeal, with costs.

Solicitors: *Simmons & Simmons* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

SHACKLOCK *v.* ETHORPE, LTD.

[COURT OF APPEAL (Greer, Slesser and Clauson, L.JJ.), **March 31, April 1, 1938.]**

The court allowed the defendants' appeal from the decision of GREAVES-LORD, J., dated Nov. 29, 1937, and reported in [1937] 4 All E.R. 672, on the ground that the plaintiff had been negligent. The question of the place of the exhibition of the notice under the Innkeepers' Liability Act, 1863, was not argued on the hearing of the appeal, but in the course of the judgments their Lordships stated their agreement with the decision of the judge on this point.

Re FROY, FROY *v.* FROY.

[Chancery Division (Simonds, J.), **March 2, 1938.**]

Will—Construction—Concurrent gifts—Joint tenancy or tenancy in common—Words of severance in original gift—Application to substitutional gift.

The testator, who died in 1897, directed his trustees to hold his residuary estate in equal fourth parts for his four children. The two sons were to take their shares absolutely, and the shares of the two daughters were settled upon the usual trusts. The share of each daughter dying without issue was to fall into and form part of the testator's residuary estate, " to be divided among " his children then living or the issue of any deceased child. In the events which had happened, four grandchildren, children of a deceased daughter, became entitled under this last provision in 1937. One of these four grandchildren, however, had died in 1932, after having attained the age of 21 years. The question was whether the four grandchildren took as tenants in common, in which case the estate of the grandchild dying in 1932 would take a share, or whether they took as joint tenants, which would have the effect of excluding the estate of such deceased grandchild :—

Held : the words of severance, " to be divided among," could properly be construed as applying equally to the substitutional as to the original shares. The grandchildren therefore took as tenants in common, and the estate of the deceased grandchild was not excluded.

[EDITORIAL NOTE. A gift to a number of persons is *prima facie* a gift to joint tenants, but very slight indication of severance is sufficient to displace the *prima facie* rule and create a tenancy in common. Here the words of severance, which are used only in the original gift, are held to extend from the original gift to a substitutional gift, it being stated that the rule in *Re Sibley's Trusts* (2) can be disregarded where the will only shortly describes the compound class of children and issue.

As to Severance, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 780, 781, paras. 1422-1425 ; and for Cases, see DIGEST, Vol. 44, pp. 977-991, Nos. 8327-8489.]

Cases referred to :

(1) *Crosthwaite* v. *Dean* (1879), 40 L.T. 837 ; 44 Digest 981, *8368*.

(2) *Re Sibley's Trusts* (1877), 5 Ch.D. 494 ; 44 Digest 1001, *8583* ; 46 L.J.Ch. 387 ; 37 L.T. 180.

Originating Summons for the determination of several questions arising on the construction of the will of William Nathaniel Froy, who died in June, 1897, and probate of whose will was granted to his executors in Aug., 1897. The testator by his will directed his trustees to stand possessed of his residue on trust to divide it into four equal shares, and gave two such shares to his two sons absolutely and the other two to his two daughters, the daughter's shares being settled on the usual trusts. In the event of either of the daughters dying without issue surviving her, there was a power to such daughter to appoint one-half or less of the income of her share in favour of her husband, if he should survive her, during his life, and subject thereto the testator directed that the share of any daughter so dying without issue her surviving was to form part of the testator's residuary estate, and " to be divided among his children then living or the issue of any deceased child ".

One of the daughters died without issue in 1937, and the summons raised questions with regard to the distribution of her share under the will. Simonds, J., held that the four grandchildren of the testator, children of his daughter, Mrs. Dunfee, who died in 1922, were entitled to one third of the share of the daughter who died in 1937. These four grandchildren had all attained the age of 21 years, and one, after attaining the age of 21 years, had died in 1932, after his mother, but before the testator's other daughter.

This report is concerned with the question then arising as to whether the four grandchildren, on attaining the age of 21 years, took an interest in the share of the testator's daughter who died without issue in 1937, liable to be divested by her death leaving issue, as joint tenants or as tenants in common. In the latter event the estate of the deceased grandchild would be entitled to one-twelfth of the residuary estate.

E. M. Winterbotham for the plaintiffs.

H. B. Vaisey, K.C., and *G. P. Slade*; *Neville Gray*; *C. E. Harman, K.C.*, and *T. A. C. Burgess*; *F. R. Evershed, K.C.*, and *G. D. Johnston*; and *Geoffrey Cross* for the defendants being persons interested in the residuary estate of the testator.

Simonds, J.: I have already decided that one-third of the share of the deceased daughter Mrs. Dickins goes to the issue of the deceased daughter Mrs. Dunfee, and the further question which I have now to determine is whether that one-third which so goes to the issue or the children of Mrs. Dunfee goes to them as tenants in common or as joint tenants.

The inclination of my opinion, until I had heard Mr. Cross, was that there was a rule of construction which really compelled me to adopt the view that the issue of Mrs. Dunfee took that share between them as joint tenants, and not as tenants in common, because it appeared to me that this was a case in which one must apply the principle that, where one has a compound class, consisting of children and other issue, there must be double words of severance if the tenancy in common is to be imported not only into the gift to the children but also into the gift to children of children.

After examining the authorities to which Mr. Cross has called my attention, I see no reason why I should not follow the decision of Fry, J., in *Crosthwaite* v. *Dean* (1), where the gift was of a sum of stock to be divided between the brother and sister of the said Jane Dee or their children, the terms of which are so nearly identical with those I have to consider that I think I should be bound to follow his decision unless it was clearly contrary to a current of authority. It is suggested that the decision of Fry, J., is contrary to the current of authority, and in particular to the authority of such cases as *Re Sibley's Trusts* (2), which came before Sir George Jessel, M.R., in 1877. I must observe that Fry, J., had *Re Sibley's Trusts* (2) before him when he decided the case of *Crosthwaite*

v. *Dean* (1) as he did, and I think that I am bound to interpret *Re Sibley's Trusts* (2), and to hold, as he did, that double words of severance are not necessary where one has a gift in shorthand such as he had there, and such as I have here. It is not a case of a compound class being the object of the testator's bounty. He has gone on to say that the children of children—that is to say, the substitutionary class—are A to take between them their parents' share. Where that is said, the testator has defined, and is presumed to have defined completely, the nature of the interest which they take. He has said that they are to take their parents' share. He has not gone on to use words which import that they are to take as tenants in common and that the others are to B take as joint tenants. Where there is, as here, a compound class, termed by Mr. Cross in felicitous words as shorthand, then it appears that that consideration does not arise. One has words of severance with which the gift opens, and which can properly be construed as applying equally to substitutional as to original shares. Therefore, contrary to the opinion C I first formed, I hold that the gift to the issue of Mrs. Dunfee is a gift to those issue as tenants in common. Consequently, the child now deceased took the vested share, one-fourth of the one-third which went to Mrs. Dunfee's issue, and that share remains hers.

Solicitors: *Hewitt, Woollacott & Chown* (for the plaintiffs); *Walter* D *Burgess & Co.*; *Lawrence, Graham & Co.*; *Baddeleys, Wardlaw & Co.* (for the defendants, persons interested in the residuary estate).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

E

COLERIDGE-TAYLOR *v.* NOVELLO & CO., LTD.

F

[Chancery Division (Morton, J.), **March 30, 31, April 1, 1938.**]

Copyright—Musical work—Assignment of the copyright by the composer on Mar. 11, 1912, *subsequent to the passing of the Copyright Act*, 1911, *but prior to the time when the Act came into operation—Whether copyright passed for the whole term of its existence—Copyright Act*, 1842, (*c.* 45)—*Interpretation Act*, 1889 (*c.* 63)—*Copyright Act*, 1911 (*c.* 46), *ss.* 5 (2), G 24.

The author and composer of the music for a musical work entitled A Tale of Old Japan, and the first owner of the copyright therein, assigned the copyright and rights of publication, representation and performance to the defendant company, in consideration of a royalty of one-eighth of the published price of the work. The assignment was H made on Mar. 11, 1912, a date subsequent to Dec. 16, 1911, when the Copyright Act, 1911, was passed, but prior to July 1, 1912, when the Act came into operation. The plaintiffs, the beneficiaries under the intestacy of the composer, claimed that, by reason of the proviso to the Copyright Act, 1911, s. 5 (2), the copyright in the work in question, as from Sept. 1, 1937—that being the expiration of 25 years from the death of the author—became their property. The defendant company maintained that, notwithstanding the proviso to sect. 5 (2) of the Act, the assignment of Mar. 11, 1912, operated to vest in them the copyright in the work for the whole term for which the copyright subsists, contending (i) that the words "after the passing of this Act" should be construed as if they read "after the commencement of this Act," and (ii) that the instrument of Mar. 11, 1912, was executed in pursuance of, and was a formal embodiment and/or specific performance of, an agreement previously made between the parties thereto in or about Sept., 1910:—

HELD: (i) the word "passing" in the statute should be construed in its natural sense. The assignment was therefore subject to the proviso, and the copyright vested in the plaintiffs on the expiration of 25 years from the death of the author.

(ii) the assignment of Mar. 11, 1912, expressed the final, concluded, deliberate terms of the contract between the parties, and, from the correspondence, it was always contemplated that there should be an assignment. Even if one looked behind the formal document, there was not anything which amounted to an assignment in law or in equity.

[**EDITORIAL NOTE.** The Copyright Act, 1911, did not come into operation for some six months after it received the Royal Assent. The proviso to sect. 5 (2) limits the operation of an assignment of a copyright to a period of 25 years from the author's death, and from the expiration of that time it is to vest in his personal representatives. This provision is to become operative from the passing of the Act, and the question here is whether the word "passing" refers to the date on which the Royal Assent was given or the later date on which the statute came into operation. There is also a further question whether the material date to be considered is the date of the formal assignment or that of the completion of the negotiations leading up to the assignment, which, it was alleged, was in law an equitable assignment of the copyright. Upon this point, it is held that the date of the formal assignment is the material one.

AS TO ASSIGNMENT OF COPYRIGHT, see HALSBURY, Hailsham Edn., Vol. 7, p. 561, para. 875; and FOR THE COPYRIGHT ACT, 1911, s. 5 (2), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 3, p. 727.]

Cases referred to:

(1) *Re Dalzell, Ex p. Rashleigh* (1875), 2 Ch.D. 9; 42 Digest 685, *995*; 45 L.J.Bcy. 29; 34 L.T. 193.

(2) *R.* v. *Smith, R.* v. *Weston*, [1910] 1 K.B. 17; 42 Digest 686, *999*; 79 L.J.K.B. 1; 101 L.T. 816.

(3) *Pretty* v. *Solly* (1859), 26 Beav. 606; 42 Digest 672, *832*; 33 L.T.O.S. 72.

(4) *London Printing & Publishing Alliance, Ltd.* v. *Cox*, [1891] 3 Ch. 291; 13 Digest 192, *270*; 60 L.J.Ch. 707; 65 L.T. 60.

(5) *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; 8 Digest 445, *205*; 74 L.J.K.B. 898; 93 L.T. 495; *revsg.*, [1904] 1 K.B. 387.

(6) *Millbourn* v. *Lyons*, [1914] 2 Ch. 231; 17 Digest 341, *1526*; 83 L.J.Ch. 737; 111 L.T. 388.

(7) *Leggott* v. *Barrett* (1880), 15 Ch.D. 306; 17 Digest 340, *1515*; 51 L.J.Ch. 90; 43 L.T. 641.

(8) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 40 Digest 312, *2664*; 69 L.J.Ch. 652; 83 L.T. 186.

(9) *Thompson* v. *Warner Brothers Pictures, Ltd.*, [1929] 2 Ch. 308; Digest Supp.; 98 L.J.Ch. 427; 141 L.T. 411.

(10) *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351; 17 Digest 340, *1516*; 53 L.J.Q.B. 348; 51 L.T. 211.

(11) *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.*, [1924] A.C. 1; 28 Digest 391, *208*; 93 L.J.K.B. 33; 130 L.T. 450.

(12) *Macdonald* v. *Eyles*, [1921] 1 Ch. 631; 13 Digest 190, *255*; 90 L.J.Ch. 248; 124 L.T. 625.

(13) *Falcon* v. *Famous Players Film Co., Ltd.*, [1926] 2 K.B. 474; Digest Supp.; 96 L.J.K.B. 88; 135 L.T. 650.

(14) *Hopkinson* v. *Forster* (1874), L.R. 19 Eq. 74; 8 Digest 449, *234*.

Action by the plaintiffs for (i) a declaration that they are, or alternatively that the first plaintiff, Mrs. Coleridge-Taylor, as personal representative of the composer, is, entitled to the copyright in a musical work composed by the late Samuel Coleridge-Taylor and entitled A Tale of Old Japan as from the termination of the period of 25 years from his death on Sept. 1, 1912, free from any right or interest of the defendants therein; (ii) an injunction to restrain the defendants, their servants and agents from infringing the plaintiffs' said copyright by reproducing or performing in public the said work after Sept. 1, 1937, or by authorising the reproduction or performance in public thereof after the said date.

F. R. Evershed, K.C., and *F. E. Skone James*, for the plaintiffs, referred to *Thompson* v. *Warner Brothers Pictures, Ltd* (9), *Leggott* v. *Barrett* (7), *Palmer* v. *Johnson* (10), *Millbourn* v. *Lyons* (6), *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.* (5), *Pretty* v. *Solly* (3); and to Maxwell's Interpretation of Statutes, 8th Edn., pp. 139, 156, 202; White and Tudor's Leading Cases in Equity, 9th Edn., Vol. 1, p. 105.

K. E. Shelley, K.C., and *E. J. Macgillivray*, for the defendant company, referred to *London Printing & Publishing Alliance, Ltd.* v. *Cox* (4), *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.* (11), *Macdonald* v. *Eyles* (12), *Falcon* v. *Famous Players Film Co., Ltd.* (13), *Re Dalzell, Ex p. Rashleigh* (1).

Morton, J.: Samuel Coleridge-Taylor, who died on Sept. 1, 1912, was the author and composer of the music for a musical work entitled A Tale of Old Japan, and he was the first owner of the copyright therein. It is agreed, as I understand it, between the parties that the first score of the work for pianoforte and voice was published by the defendants, Novello & Co., Ltd., in Sept., 1911. There was a second edition of that form of the work in Sept., 1912, and the work as orchestrated for a full orchestra was published in June, 1912. On Mar. 11, 1912, Mr. Coleridge-Taylor executed what is headed a memorandum of agreement. This document, which is on a printed form supplied by the defendants, with the blanks filled in to suit the particular case, is in the following terms:

> Memorandum of agreement made Mar. 11, 1912, between Samuel Coleridge-Taylor of Aldwick St. Leonards Road Croydon in the county of Surrey (hereinafter called the vendor) of the one part and Novello & Co. Ltd. a company limited by shares having its registered office at 160 Wardour Street in the county of Middlesex (hereinafter called the purchasers) of the other part: Whereby it is agreed that in consideration of the sum of 3¾*d*. for every copy to be published and sold by the purchasers . . . to be paid by the purchasers to the vendor so long as the copyright shall last for the absolute purchase of the copyright and right of publication representation and performance and all other the rights property and interests

> intended to be hereby assigned he the vendor as beneficial owner doth hereby assign unto the purchasers all the copyright and right of publication representation and performance of him the vendor of and in the musical composition or work specified in the schedule hereunder written including the title thereof for the United Kingdom of Great Britain and Ireland including the Channel Islands and its colonies and dependencies and for all foreign countries and all other the property rights and interests whether at law or in equity of him the vendor therein or thereto to hold the same unto the purchasers for their absolute property.

The work specified in the schedule is :

> A TALE OF OLD JAPAN, a cantata for solo, chorus and orchestra.

Then the document proceeds :

> And the purchasers hereby agree with the vendor that the purchasers will cause to be entered in proper books to be kept by them a true account of all copies of the said composition sold by them and will allow such account to be inspected at all reasonable times by the vendor and will pay or cause to be paid to the vendor the aforesaid sum of 3¾*d.* for each copy (except as and subject to reduction abovementioned) on or about Feb. 1 in each year so long as the copyright shall last.

I may mention in passing that it is a mere matter of arithmetic to note that 3¾*d.* is one-eighth of 2*s.* 6*d.*, and I had the evidence of a Mr. Brook, a director of the defendant company, that the work in question—that is to say, at any rate, the solo and voice and pianoforte part of it—was sold for 2*s.* 6*d.* That may be of some materiality, but it is to be observed that, as Mr. Brook said, the published price may have varied from time to time—it was not a constant factor—and, according to the terms of the agreement, what is to be paid is 3¾*d.* for every copy to be published. Mr. Brook also said, however, that, as a matter of practice, as I understood it, a royalty was paid of one-eighth of the published price throughout.

That assignment having been made, Mr. Coleridge-Taylor died intestate on Sept. 1, 1912. On Oct. 16, 1912, letters of administration of his estate were granted to the first plaintiff, his widow. The other two plaintiffs are two children of Mr. Coleridge-Taylor. On Mar. 17, 1930, Mrs. Coleridge-Taylor assigned to all three of the plaintiffs the copyright of and in the published and unpublished works of the composer :

> and all performing and mechanical rights and all other rights in respect of the same so far as at present vested in Mrs. Coleridge-Taylor as legal personal representative together with all future rights in respect of any of the foregoing that may arise either under existing statutes or by law relating to copyrights or under any further statutes and together with all manuscripts subject nevertheless to and with the benefit of such contracts licences and agreements as have been entered into by the late Samuel Coleridge-Taylor or Mrs. Coleridge-Taylor as his legal personal representative to hold unto Mrs. Coleridge-Taylor and the daughter and the son as tenants in common in equal shares absolutely.

So far, it would appear as if this assignment—as I shall so describe the document of Mar. 11, 1912—would pass to the defendants in this action all the rights whatsoever in the then-existing copyright of Mr. Coleridge-Taylor prior to the coming into force of the Copyright Act, 1911, an Act which actually came into operation on July 1, 1912. There were two rights under the Copyright Act, 1842, one being (putting it shortly) a right to make copies of the work, and the other being a right to perform it in public.

I think that it is the fact, when we come to the Act of 1911, that the word "copyright" is sometimes used as referring to those rights which were in existence under the Act of 1842, before the Act of 1911 came into existence. The copyright—using it in the comprehensive sense, as meaning the rights vested in Mr. Coleridge-Taylor, the author, before the 1911 Act—would have expired, under the Act of 1842, 42 years from the publication of the work, or seven years after the death of Mr. Coleridge-Taylor, so that, in the events which have happened, it would expire in Sept., 1953.

The Copyright Act, 1911, was passed on Dec. 16, 1911, but by sect. 37 (2) of the Act it was provided :

> This Act shall come into operation (*a*) in the United Kingdom, on July 1, 1912, or such earlier date as may be fixed by Order in Council ; (*b*) in a self-governing dominion to which this Act extends, at such date as may be fixed by the legislature of that dominion ; (*c*) in the Channel Islands, at such date as may be fixed by the states of those islands respectively ; (*d*) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the governor.

So that there was, in the case of the United Kingdom, a gap of some months between the passing of the Act and its coming into operation, and it was possible, in view of the provision which I have just read, for there to have been a considerably longer gap between the passing of the Act and the coming into operation of the Act in other parts of the Dominions and other British possessions.

The first point which arises in this action is a very curious point of construction. It will be observed that the assignment of Mar. 11, 1912, was executed between the passing of the Copyright Act, 1911, and the coming into operation of that Act. It is provided by a proviso to the Copyright Act, 1911, s. 5 (2) :

> Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of 25 years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void . . . .

Then there is a provision which I need not read, as it is immaterial for the purposes of the present case.

The plaintiffs in this case say that, by reason of the provisions which I have just read, the copyright in the work in question, as from Sept. 1, 1937—that being the expiration of 25 years from the death of the author—became the property of the plaintiffs, or, alternatively, the property of the first-named plaintiff as legal personal representative of the author. The plaintiffs allege that the defendants

> claim that the copyright in the said work remains vested in them after Sept. 1, 1937, and threaten and intend to reproduce and perform in public the said work after Sept. 1, 1937, and to authorise the reproduction or performance thereof after the said date.

The plaintiffs claim a certain declaration (which I need not at the moment read at length) and an injunction.

The defendants raise two quite separate defences. One is a defence which is based solely on the construction of the Copyright Act, 1911, and under that head they say that, notwithstanding the proviso to sect. 5 (2) which I have just read, the assignment of Mar. 11, 1912, did operate to vest in the defendants the copyright in the work for the whole term for which the copyright subsists. The other contention is based upon certain earlier correspondence between the parties, to which I must refer later.

Dealing first with the argument based upon the construction of the statute, I would first observe that there is no doubt here that the author of the work in question was the first owner of the copyright, using the word "copyright" in the sense of those rights which are conferred by the Copyright Act, 1842. As regards the words "after the passing of this Act," I have been invited by counsel for the defendants to construe those words as if they read: "after the commencement of this Act." I entirely decline to put that construction upon the word "passing." The word "passing" is used in several places in the Copyright Act, 1911, as is also the word "commencement." As far as the word "commencement" is concerned, under the Interpretation Act, 1889, s. 36 (1), it is provided that:

> In this Act and in every Act passed either before or after the commencement of this Act, the expression "commencement," when used with reference to an Act, shall mean the time at which the Act comes into operation.

With regard to the word "passing," I would first refer to *Re Dalzell, Ex p. Rashleigh* (1). I need not refer to the facts of the case. JAMES, L.J., says, at pp. 12, 13:

> I am of opinion that in the Act of 1869 the words "the date of the passing of the Bankruptcy Act, 1861," mean what they say. They are English words, common words, and words which have a fixed meaning in our language and law. They mean the time when the Royal Assent is given to a bill which has passed both Houses of Parliament. That is the meaning of the words, and no court ought to depart from the plain meaning of plain English words, unless coerced to do so by some very serious injustice, a hardship which would arise from a literal interpretation, for instance, where the literal interpretation would, in the opinion of the court, operate so harshly that the court would be driven to suppose that there must have been some clerical mistake in the language of the Act, or deed, or whatever may be under consideration.

I do not find in the present case that I am in any way coerced to construe the word "passing" as if the word "commencement" had been used.

To the same effect is a passage in *R.* v. *Smith*, *R.* v. *Weston* (2), where LORD ALVERSTONE, C.J., said, at p. 25:

> It is said that, because of this necessity of postponing the date of the Act coming into operation, we ought to read the words "after the passing of this Act" in sect. 10 in their non-natural meaning. In order to justify our doing so we must find some necessary implication to that effect in the Act itself, or the nature of the Act must be such as to compel us to come to that conclusion.

Although I have carefully attended to the ingenious argument of Mr.

Shelley and Mr. Macgillivray, I can find no useful reason why I should construe the word "passing" in its non-natural sense. On the contrary, it seems to me that there might be very good reason for the legislature inserting this provision to safeguard the estates of the legal personal representatives of authors against some of the results which might otherwise accrue from an assignment of their copyright. I think that it A is quite likely (although this must be mere speculation) that, in using the word "passing," the legislature then had in mind that, when the Act was passed and its contents were common property, there might possibly be a very large number of assignments of copyright, and that the legislature intended in that event to make special provision in regard B to those assignments. However that may be, I construe the word "passing" as bearing its ordinary meaning. It seems to me that, if it is so construed, the word "copyright," where it first occurs in the proviso, must include, not only the copyright under the Act of 1911, but also the rights which existed prior to the passing of that Act. Indeed, it is con- C ceded by Mr. Shelley that, so far as regards the use of the word where it first appears in the proviso, where the words "no assignment of copyright" appear for the second time, they would also include the rights which existed before the passing of the Act. If, as I think, the proviso is referring to assignments which might be executed before the 1911 D Act had come into operation at all—that is to say, in the interval between its passing and its coming into operation—it seems to me necessary to construe the word "copyright" as extending to the rights which existed before the Act was passed. The result is that, as far as this proviso is concerned, it seems to me to cover in the clearest possible E terms the very case with which I am dealing, a case in which the author of the work is the first owner of the copyright therein. There was an assignment of the copyright after the passing of the Act, and, unless I can find something in the language of the rest of the Act which compels me to depart from what seems to be the clear meaning of these words, F I should feel disposed to give these words in the proviso to sect. 5 (2) their full effect.

It has been argued by counsel for the defendants that, in the circumstances with which I have to deal, what otherwise would have been the effect of this proviso is nullified by the provisions of sect. 24 of the G Act. Sect. 24, so far as material, is as follows:

> (1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the first schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such H substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder:

Mr. Shelley says, and I agree with him, that the words "such substituted right shall subsist" have reference to the existence or continuance of the time during which the right will subsist or continue, and are not referable to the ownership of the right. He also says that the defendants in this case were, immediately before the commencement of the Act, entitled to both the copyright and performing right under the former Act, that they are now entitled to the copyright as defined by this Act, and, further, that they are entitled to that right, not A merely for the 25 years which are laid down by the proviso to sect. 5, but for the more extended period to which they would have been entitled to it but for that proviso.

I do not propose to go in detail through the provisoes to sect. 24, although they are of importance in considering the matter, nor to elaborate B the ingenious argument which has been addressed to me on the subject. Mr. Shelley also relies upon sect. 24 (3), which is in the following terms :

> Subject to the provisions of sect. 19 (7), (8), and of sect. 33 of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with, the provisions of this section.

C Mr. Shelley says, in effect, that that subsection sweeps away the provisions of the proviso to sect. 5 so far as they relate to an assignment of a pre-1911 copyright made after the passing of the Copyright Act, but before its commencement. I do not feel disposed to give the subsection that operation. It seems to me that I ought, if possible, to make the D various sections harmonise with one another. I think that the explanation of any apparent inconsistency must be that sect. 24 (3) is a section dealing with a transition period, and it is not intended by such a subsection to contradict or to take away the rights which have previously been given to the legal personal representative of an author by E the proviso to subsect. (2). Mr. Evershed and Mr. Skone James suggested alternative versions of the true meaning of the phrase "copyright shall not subsist" in sect. 24 (3). Mr. Skone James's suggestion was that it means "There shall be no copyright in any work made before the commencement of this Act," unless by the same section new copyright is F substituted for existing copyright in respect of that work. In this case, it is not disputed that, in respect of the work in question, A Tale of Old Japan, a new copyright was substituted for the existing copyright. Mr. Evershed's suggestion was that every copyright except those rights which are dealt with in sect. 19 (7), (8), shall be subject to the G provisions of, and shall comply with, this section. Perhaps one might multiply examples of how the true meaning of the section ought to be put, but, in my view, I am not compelled to construe it as contradicting or as taking away the rights already given by the proviso to sect. 5, and I do not propose so to construe it. I propose to rest upon what I H conceive to be a firm rock on this question of construction : that the words of the proviso to sect. 5 (2) directly apply to this particular transaction word for word, and I can find nothing in the rest of the Act which compels me to refrain from giving these words what I think is obviously their very clear meaning. I may add that, if the two sections were irreconcilable otherwise, there is the principle, which I think I should be disposed to apply, laid down in MAXWELL'S INTERPRETATION OF STATUTES, 8th Edn., p. 156 :

> Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special Act and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one.

That passage, which is based on certain authorities cited in the notes, is dealing with the question of two separate Acts, one a special Act and the other a general Act, but the same principle has been applied to two different sections of the same Act.

In *Pretty* v. *Solly* (3), the principle was laid down by ROMILLY, M.R., in the following words, at p. 610 :

> The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

I now have to turn to the second defence, which is pleaded in the following way :

> The said instrument was executed in pursuance of and was a formal embodiment and/or specific performance of an agreement previously made between the parties thereto in or about Sept., 1910, which agreement is evidenced by and expressed in the following documents, that is to say . . .

Then there is set out a number of letters, the number of which has been increased by amendment. I need not read all the pleas at length, but it has been argued before me that the correspondence amounted to a legal assignment of the copyright in 1910, or, alternatively, that it amounted to an equitable assignment of the copyright, and that, in either event, assuming that the assignment of Mar., 1912, conveyed to the defendants nothing more than the copyright for the life of the composer and the period of 25 years after his death, the defendants are still entitled to the copyright, by reason of the fact that there was in 1910 this equitable or legal assignment. Now, in order to ascertain whether there was a legal assignment, in the first place it is necessary to look at the letters. The first one is dated Sept. 2, 1910, and it is from Mr. Coleridge-Taylor to a Mr. Clayton, who I understand was some official of the defendant company :

> Dear Mr. Clayton, I have a new (short) work for quartet chorus and orchestra called A TALE OF OLD JAPAN, the poem by Alfred Noyes, whose new fairy play is to be produced at His Majesty's at Xmas, and for which I am also writing the music.

I should have said that in the published work the words which appear are not the work of Mr. Coleridge-Taylor, but the work of Mr. Alfred Noyes. The letter proceeds:

> I think you'll find the subject very fresh and I hope you'll like the music. S. is anxious to do the thing at Brighton with his festival chorus this coming season. I should of course like the usual royalty if Messrs. Novello's agree to accept the work, but as a special favour, I wonder if they would consent to paying me £25
> A down (instead of £10) on account of future royalties, this because it has taken me a long time to do, and also because it will take long time to orchestrate.

From that observation it is plain that the work had not been orchestrated at this date.

> Thank goodness there are no stage rights or anything of that kind to consider
> B this time. Would you please let me know at the earliest possible moment about this matter.

Then there is another letter, which I need not read, but the reply to the letter which I have just read is dated Sept. 28, 1910, and is as follows:

> Dear Sir, We have carefully considered your work A TALE OF OLD JAPAN and
> C shall be happy to publish it if you will accept a royalty on the same basis as that paid on your other works and provided satisfactory arrangements can be made with regard to the words. Will you kindly ascertain from Mr. Noyes whether he wishes to dispose of the copyright of his words or merely to give permission for them to be used in conjunction with your music, and also what his fee is in each case. Assuming that this matter is settled satisfactorily we shall be happy to pay you £25 on account of royalties as suggested by you in your letter of Sept. 2.
> D We are returning the MS. by this post so that you may be able to proceed with the orchestration.

It is to be observed that there is a reference there to a royalty "on the same basis as that paid on your other works." Mr. Shelley contended that the words "on the same basis" refer, not merely to the rate of
E remuneration, but to other matters. I am inclined to the view that that argument is ill-founded, because the other works are identified in the next letter, and it is plain from the evidence that one of them had not in fact been assigned to Messrs. Novello at the date when the letter was written.

F On Sept. 30, 1910, Mr. Coleridge-Taylor replied:

> Thank you for your letter regarding my MS. A TALE OF OLD JAPAN. I have written to Mr. Noyes about his poem and he will doubtless answer you direct. The terms you mention will be quite satisfactory to me—royalty based the same as in the BON-BON SUITE and ENDYMION'S DREAM and £25 down.

I need not trouble with the rest of the letter. The assignment of the
G BON-BON SUITE and ENDYMION'S DREAM are before me. The former assignment is in the same form, I think, as is the assignment of Mar., 1912. It is dated Mar. 4, 1908, and the royalty payable is 3*d*. per copy. The assignment of the copyright of ENDYMION'S DREAM is dated Mar. 30, 1911. The royalty again is 3*d*. per copy, and the rights assigned are not
H identical with the rights which were assigned in the case of the BON-BON SUITE, certain exceptions being made.

The position then was that the terms appear to have been satisfactory to both parties, as far as remuneration goes. There is this doubt still, whether the royalty basis in the assignment as ultimately executed on Mar. 11, 1912, is the same as the basis of the other two assignments.

It is quite true that in each case, as I understand the conveyance, the royalty is one-eighth of the original published price, but, on the strict interpretation of the assignment of Mar. 11, 1912, if the published price were altered, the royalty would remain the same—namely, $3\frac{3}{4}d$. However that may be, I can pass on to the next letter, which is a letter from Mr. Coleridge-Taylor dated Oct. 25, 1910 :

> Dear Mr. Clayton, I left the vocal score of A Tale of Old Japan at Wardour St. last week and am to-day sending the full score . . .

There is evidence that the full score includes the orchestration. The term " the full score " means and includes the orchestrated score.

> . . . so all is now completed. If everything is satisfactorily settled with Mr. Alfred Noyes, may I hope to have a cheque as arranged during the week.

Mr. Shelley says that at some stage there was a complete legal assignment, and I think in the final stages of his argument he fixed this letter as the final stage. He said that there was a complete assignment, subject to a condition—that is, the arrangement with Mr. Noyes—which was afterwards fulfilled. I think, however, that it is necessary, in order to see whether that is the correct view of the matter, to look at the correspondence as a whole, including the answer to that letter and the subsequent acts of the parties. The answer is as follows, on Nov. 9, 1910 :

> Dear Sir, We have now made arrangements with Mr. Noyes' agents by which we have acquired the sole musical rights of his poem A Tale of Old Japan and also the right to authorise the printing of the words in concert programmes. The work can now be proceeded with, and we are enclosing a cheque for £25 on account of royalties in accordance with your request of Sept. 2, addressed to Mr. Clayton. Will you kindly send us a *provisional* receipt for the cheque now, as we shall want to make the cheque appear on the assignment which will be sent to you in due course.

The next document pleaded in the defence is a cheque, which was dated Nov. 9, 1910, and for which a receipt was given dated Nov. 11, 1910, in the following terms :

> Received of Novello & Co., Ltd., the sum of £25 for an account of royalties of A Tale of Old Japan.

That is signed by Mr. Coleridge-Taylor. In my view, the real meaning and effect of this correspondence is that the parties contemplated and intended that there should be a formal assignment of the copyright by Mr. Coleridge-Taylor to the defendants. That was the end to which the correspondence was leading up, and Mr. Coleridge-Taylor finally did execute a formal assignment of the copyright to the defendants. If no formal assignment had been executed, I might have had to consider in more detail whether or not I could find in the earlier documents an assignment, or an agreement to assign ; but, in my view, upon the authorities which have been cited to me, to which I will refer briefly, if I form the view, as I do, that the parties intended to carry out this transaction by a formal assignment, and if I find, as I do, that the formal assignment was executed, I am not entitled to go back behind that formal assignment, and to ascertain what was the position and what were the negotiations, and whether or not the negotiations ever reached the stage of what would have been held to be an equitable assignment if the parties had not intended all along to carry out the matter by a formal assignment.

As regards the question whether it is an equitable assignment, there is one other matter to which I should refer before I cite the authorities. It has been pointed out by Mr. Evershed in his speech in reply that under the Copyright Act, 1842, s. 22, which I need not read at length, the letters in question, even if they amounted to an equitable assignment of the right to reproduce or multiply copies of the work, could not amount to an assignment of the right of performance.

The cases to which my attention has been called on this aspect of the case, first of all taking the cases cited by Mr. Shelley, are, first, *London Printing & Publishing Alliance, Ltd.* v. *Cox* (4). In that case, it was held by a majority of the Court of Appeal that the title to a certain copyright passed by virtue of a certain letter, but FRY, L.J., who delivered the judgment of the majority of the Court of Appeal, in my view laid emphasis upon the fact that in the case before him it was never intended that the further document of assignment should be executed. In regard to an earlier document of Apr. 11, 1890, he said, at p. 303:

> It does not appear to me to have been intended that any further assignment in writing should be executed.

In regard to a subsequent letter, he said, at p. 303:

> The intention of both parties was that the picture should pass at once. . . .

In my view, that case does not cover the present case, where, as I have said, I think the intention of the parties was otherwise.

Mr. Evershed has referred me to a passage in WHITE AND TUDOR'S LEADING CASES IN EQUITY, 9th Edn., p. 105, which is as follows:

> No rule can be laid down as to the form requisite for a valid equitable assignment. In LORD MACNAGHTEN'S speech in *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.* (5), he referred to the contention that the document relied upon in that case did not use the language of an assignment, and proceeded [at p. 462]: An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril.

Then there is a further quotation on the same page:

> "The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear".

Then, under the heading "Where no equitable assignment is created," the authors say, at p. 109:

> The intention, however, to assign or to create a charge must be shown. Thus, a mere letter of instruction to a banker not written with any intent to create a charge on a fund in his hands, will not amount to an equitable assignment. "You can have no charge in equity without an intention to charge," said JESSEL, M.R. in *Hopkinson* v. *Forster* (14) at p. 75. "The letter on which you rely was not written with any intent to charge the fund; it was a mere letter of instructions to the bankers."

On rather a different aspect of the case, Mr. Evershed called my attention to the case of *Millbourn* v. *Lyons* (6), where reference was made to the earlier case, also cited by Mr. Evershed, of *Leggott* v. *Barrett* (7). In *Millbourn* v. *Lyons* (6), the headnote states :

> In Dec., 1898, the owner in fee of an hotel agreed to sell it to H., the predecessor in title of the plaintiffs. The contract provided that the conveyance should contain a covenant by H. restrictive of the user of the hotel for the benefit of adjoining houses and lands of which the vendor was owner in fee but under a different title. It was a residential neighbourhood, but the contract was no part of a building scheme. The purchase was completed in Dec., 1899, and the conveyance contained a covenant by H. in the terms of the restrictive stipulation with the executors of the vendor, who had died. Between the date of H.'s contract and the date of completion all the vendor's houses and lands adjoining the hotel were put up for sale by public auction in lots subject to conditions of sale which made no reference to H.'s contract or to the restrictive stipulation. All the lots were sold and conveyed to various purchasers before Dec., 1899.

Then there was a sale by the plaintiff to the defendant of the hotel free from restrictions, and the question arose whether the restrictive stipulations in H.'s contract and conveyance bound the defendant. It was argued by counsel for the appellant in that case (the appellant being the defendant) that the agreement for sale created an equitable right which ran with the land (p. 234) :

> . . . and it can be enforced by the vendors, their heirs and assigns, owners, and occupiers of the adjoining property, even though they did not know of the existence of the restriction.

In dealing with that argument, Lord Cozens-Hardy, M.R., said, at p. 240 :

> Mr. Jenkins and Mr. Methold say this : Whenever you have a contract in writing, that makes in equity the purchaser the owner of the estate, and if by the contract there is anything in the nature of a restrictive agreement, that creates an interest in the whole of the estate which at the date of the agreement was intended to be protected by the agreement, and that the benefit of that inheres to every part of the estate in this sense, that the purchasers of the adjoining property, although they knew nothing about it, took the benefit of it ; and *Rogers* v. *Hosegood* (8) is cited for that purpose. I think that that is a mistake and, if I may venture to say so, a dangerous mistake. It is a mistake because, speaking generally, it is perfectly clear that when you have a conveyance which expresses the final concluded deliberate terms of the contract between the parties you cannot affect or alter that by reference to the antecedent contract. The case which Mr. Peterson referred to of *Leggott* v. *Barrett* (7) puts that extremely strongly.

Then he quoted the passage from the judgment of Brett, L.J., in *Leggott* v. *Barrett* (7).

In this case, we have an assignment which, in my view, expresses the final, concluded, deliberate terms of the contract between the parties, and it was always contemplated, in my view, that there should be such an assignment.

In dealing with the same point, Swinfen Eady, L.J., in *Millbourn* v. *Lyons* (6), said at pp. 243, 244 :

> . . . but if the argument that has been addressed to us is well-founded, and if the mere contract was to bind the land, there would have to be in every case an agreement put on the title which would revolutionise the practice of conveyancing. Not only that, but it would be a departure from the well-established principles that when you have negotiations leading up to a contract you do not look at the negotiations to construe the contract in writing, you only look to the written con-

tract, and so where there is a contract followed by a conveyance you look at the terms of the conveyance.

He then quotes the words of JAMES, L.J., in *Leggott* v. *Barrett* (7), at p. 309:

> It is very important, according to my view of the law of contracts, both at common law and in equity, that if parties have made an executory contract which is to be
> A carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself.

Even if I look behind the formal document which was executed in Mar., 1912, I do not think that there was anything which amounted to an
B assignment in law or in equity. I think that the whole matter must rest upon the effect of the assignment of Mar. 11, 1912. That assignment, by reason of the provisions of the Copyright Act, 1911, to which I have already referred, only operated, in my view, to grant the copyright to the defendants for the period of 25 years from the death of Mr. Coleridge-
C Taylor.

The result is that, in my view, the plaintiffs are entitled to the assignment by Mrs. Coleridge-Taylor.

Solicitors: *Syrett & Sons* (for the plaintiffs); *Field, Roscoe & Co.* (for the defendants).

D

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

Re WARREN, WHEELER *v.* MILLS.

E [CHANCERY DIVISION (Luxmoore and Morton, JJ.), **March 14, 21, April 4, 1938.**]

Bankruptcy—Assignment of debt to guarantor of bankrupt's banking account—Money when received to be paid to guarantor—Right of trustee to recover—Receiving order—Priority over non-judicial acts on same day—Bankruptcy Act, 1914 (*c.* 59), *s.* 45.

F

The appellant, for the purpose of financing building operations of the bankrupt, guaranteed an overdraft upon the bankrupt's banking account. All moneys realised by the sale of the building were to be paid to the appellant's solicitors, who were also to act in these matters as the bankrupt's solicitors. After a deduction for costs, the moneys were to be paid by the solicitors into the appellant's banking account,
G and were to be applied by the appellant in reduction of the bankrupt's overdraft, and therefore in relief of the appellant's guarantee to the bank. In pursuance of this agreement, the solicitors received on a Saturday morning a sum of £963 9*s.* 3*d.*, which was paid by them to the credit of their client's account. They entered this sum in their books in favour of the bankrupt, but admitted that, upon the terms of the arrangement, they could not and would not have paid any part
H of that sum to the bankrupt, even if he had demanded payment. On the following Monday, before 11 a.m., they paid that sum by cheque to the appellant's banking account. A little later on the same day, the receiving order against the bankrupt was made. Neither the appellant nor the solicitors had any notice of the pending bankruptcy proceedings:—

HELD: (i) the arrangement constituted a good equitable assignment of the moneys, which therefore could not properly be dealt with otherwise than in accordance with the arrangement. The moneys were not the moneys of the bankrupt, to dispose of as he wished, and the payment to the appellant could not be impeached.

(ii) when two judicial acts are done on the same day, the earlier act takes priority; but where a judicial act and a non-judicial act are done on the same day, the judicial act is referred back to the earliest moment of the day, and takes priority over the non-judicial act. The receiving order must therefore be taken to have been made before the payment above referred to.

[**EDITORIAL NOTE.** The more important decision here, that of dealing with the priority of a judicial act, is not really essential to the decision of the case, and can be treated as *obiter.* The matter, however, was fully argued, and the judgment deals with the relevant authorities. Upon the question of the equitable assignment, it will be noticed that, although the appellant was entitled to receive the moneys, he was bound under the arrangement to apply them to the reduction of the bankrupt's overdraft. It is held, however, that the fact that he had guaranteed that overdraft prevented the conclusion that these were moneys held by him in trust for the bankrupt.

As to Acts on the Same Day, see HALSBURY, 1st Edn., Vol. 27, Time, pp. 455, 456, paras. 900-902; and for Cases, see DIGEST, Vol. 42, p. 964, Nos. 384-392.

As to Effect of Receiving Order on Assignments, see HALSBURY, Hailsham Edn., Vol. 2, pp. 92-94, paras. 107-109; and for Cases, see DIGEST, Vol. 4, pp. 166-168, Nos. 1554-1571.]

Cases referred to:

(1) *Holroyd* v. *Marshall* (1862), 10 H.L. Cas. 191; 20 Digest 252, *159*; 33 L.J.Ch. 193; 7 L.T. 172.

(2) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; 20 Digest 334, *770*; 58 L.J.Q.B. 75; 60 L.T. 162; *revsg.* S.C. (1886), 18 Q.B.D. 25.

(3) *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; 8 Digest 445, *205*; 74 L.J.K.B. 898; 93 L.T. 495; *revsg.*, [1904] 1 K.B. 387.

(4) *Re Lind, Industrials Finance Syndicate, Ltd.* v. *Lind,* [1915] 2 Ch. 345; 8 Digest 434, *118*; 84 L.J.Ch. 884; 113 L.T. 956.

(5) *Palmer* v. *Carey,* [1926] A.C. 703; Digest Supp.; 95 L.J.P.C. 146; 135 L.T. 237.

(6) *Re Gillott's Settlement, Chattock* v. *Reid,* [1934] Ch. 97; Digest Supp.; 102 L.J.Ch. 332; 149 L.T. 419.

(7) *Re Paine, Ex p. Read,* [1897] 1 Q.B. 122; 5 Digest 856, *7181*; 66 L.J.Q.B. 71; 75 L.T. 316

(8) *Edwards* v. *R.* (1854), 9 Exch. 628; 42 Digest 964, *385*; 23 L.J.Ex. 165; 23 L.T.O.S. 39; *affg.* S.C. (1853), 9 Exch. 32.

(9) *Porchester (Lord)* v. *Petrie* (1783), 3 Doug. K.B. 261; 42 Digest 964, *386.*

(10) *Pugh* v. *Robinson* (1786), 1 Term Rep. 116; 42 Digest 964, *391.*

(11) *Swain* v. *Morland* (1819), 1 Brod. & Bing. 370; 16 Digest 226, *172.*

(12) *Wright* v. *Mills* (1859), 4 H. & N. 488; 42 Digest 964, *390*; 28 L.J.Ex. 223; 33 L.T.O.S. 152.

(13) *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63; 42 Digest 964, *392*; 51 L.J.Q.B. 1; 46 L.T. 49.

(14) *Anon.* (1699), 1 Ld. Raym. 480; 42 Digest 947, *199.*

(15) *Arnote* v. *Breame* (1704), 6 Mod. Rep. 244; 7 Digest 244, *875.*

(16) *Thomas* v. *Desanges* (1819), 2 B. & Ald. 586; 5 Digest 832, *7050.*

(17) *Randall* v. *Gurney* (1819), 3 B. & Ald. 252; 2 Digest 433, *830.*

(18) *Pewtress* v. *Annan* (1841), 9 Dowl. 828; 5 Digest 915, *7484.*

(19) *Woodland* v. *Fuller* (1840), 11 Ad. & El. 859; 5 Digest 832, *7054*.
(20) *Re Clarke*, [1898] 1 Ch. 336; 21 Digest 423, *53*; 67 L.J.Ch. 234; 78 L.T. 275.
(21) *Cotton* v. *Heyl*, [1930] 1 Ch. 510; Digest Supp.; 99 L.J.Ch. 289; 143 L.T. 16.
(22) *Re Whitting, Ex p. Hall* (1879), 10 Ch.D. 615; 5 Digest 696, *6127*; 48 L.J.Bcy. 79; 40 L.T. 179.
(23) *Re Jones, Ex p. Nichols* (1883), 22 Ch.D. 782; 5 Digest 697, *6129*; 52 L.J.Ch. 635; 48 L.T. 492.
(24) *Wilmot* v. *Alton*, [1897] 1 Q.B. 17; 5 Digest 696, *6126*; 66 L.J.Q.B. 42; 75 L.T. 447.

APPEAL from the decision of His Honour JUDGE CLEMENTS, sitting at Rochester County Court on Jan. 19, 1938, ordering on the motion of the respondent that the appellant should repay to the respondent the sum of £963 9*s.* 3*d.*, paid on Mar. 15, 1937, to the Broadstairs branch of the Westminster Bank, Ltd., for the credit of the appellant, as being part of the bankrupt's property, distributable amongst his creditors. The grounds of appeal were (i) that, on the facts proved or admitted before the judge, the sum in question—namely £963 9*s.* 3*d.*—was at all material times the property in equity of the appellant, and that the judge was wrong in holding the contrary, (ii) alternatively, (*a*) that the judge was wrong in law in holding that a receiving order made against the bankrupt at 11.15 a.m. on Mar. 15, 1937, operated as from an earlier hour than 11.15 a.m. on the said date, and (*b*) that, on the facts proved or admitted before the judge, the payment of the said sum to the said bank before 11 a.m. on the said date was a transaction protected by the Bankruptcy Act, 1914, s. 45.

J. B. Blagden and *L. G. Scarman* for the appellant.

Norman E. Wiggins for the respondent.

Blagden: The payment in question was made before 11 a.m. on Mar. 15, 1937. There are two reasons why I should not repay it. The first is that it was not the bankrupt's money at all. The other reason is that it was paid before the actual making of the receiving order. My client had no notice of any act of bankruptcy, nor had the solicitors acting for him. If the making of a receiving order is a judicial act, it is said that it operates from the earliest moment of the day on which it is pronounced. I do not dispute that the making of a receiving order is a judicial act, but I do dispute the conclusion which is drawn from it. Date means the actual moment at which an instrument becomes effective. Therefore, it may be said, the point turns upon the meaning which may be given to the word " date " in sect. 45. The word " date," though sometimes used as a shortened form of " day of date," is not a synonym for it, but means a particular time at which an instrument is given, executed or delivered. If one looks at the history of sect. 45, there is authority for saying that the word " date " should be construed in the way that I have contended it should be. [Counsel referred to the Bankruptcy Law Consolidation Act, 1849, s. 133, to earlier Bankruptcy

Acts, and to *Anon.* (14), *Arnote* v. *Breame* (15), *Thomas* v. *Desanges* (16), *Randall* v. *Gurney* (17), *Pewtress* v. *Annan* (18), *Woodland* v. *Fuller* (19), *Re Clarke* (20), *Clarke* v. *Bradlaugh* (13), *Brandt's* (*William*) *Sons & Co.* v. *Dunlop Rubber Co.* (3), *Cotton* v. *Heyl* (21), *Holroyd* v. *Marshall* (1), *Palmer* v. *Carey* (5), *Re Gillott's Settlement, Chattock* v. *Reid* (6).]

Wiggins : The debtor said that, when the time came for him to A
sell the property, he was told how the moneys would be dealt with, and that the moneys would be paid to Mr. Wheeler's account. The judge has found that there was no agreement which gave a legal or equitable charge upon the property, but that the course taken was
a method of procedure. That was a finding of fact which the judge B
formed after having seen the parties in the witness-box. It was a procedure to be followed, and it gave Mr. Wheeler no property in the money. The original agreement was for Mr. Wheeler to guarantee the account at the bank. To create a charge, there must be a clearly ex-
pressed intention to do so. The present contract is not one of which C
specific performance would be ordered, and therefore there could not be an equitable assignment. On the facts of the present case, the sum of money in the hands of the solicitor represented the profit made from the buildings upon the land. It represented the land. Even assuming the
facts as stated by the appellant to be correct, this money was to be paid D
to Mr. Wheeler's banking account. Various deductions were to be made, and the balance was to be paid into the bankrupt's own banking account. It is clear upon that that it was not intended to be a charge upon this money. Mr. Wheeler's banking account was only a conduit pipe to
make sure that the money was paid into the banking account of the E
debtor, in order that the overdraft might be reduced accordingly. Mr. Wheeler had a personal interest in one sense, but he could not have used the money for any purpose other than paying it into the debtor's banking account, and Mr. Wheeler had no charge upon the property.
As the county court judge has found, it was a method of procedure, F
and nothing more. Regarding the question of the date of the receiving order, the Bankruptcy Act, 1845, s. 45, means what it says—namely, before the actual date of the receiving order, and not before the receiving order is made. [Counsel referred to *Brandt's* (*William*) *Sons & Co.* v.
Dunlop Rubber Co. (3), *Palmer* v. *Carey* (5), *Holroyd* v. *Marshall* (1), *Re* G
Whitting, Ex parte Hall (22), *Re Jones, Ex parte Nichols* (23), *Wilmot* v. *Alton* (24), *Edwards* v. *R.* (8), *Wright* v. *Mills* (12), *Clarke* v. *Bradlaugh* (13), *Thomas* v. *Desanges* (16), *Pewtress* v. *Annan* (18), *Re Clarke* (20).]

Scarman, in reply, referred to *Re Paine, Ex parte Read* (7), *Palmer* v. H
Carey (5).

Luxmoore, J. [delivering the judgment of the court] : This is an appeal from an order of His Honour Judge Clements sitting in the Rochester County Court. The order was made on Jan. 19, 1938, on a motion by the trustees of the estate of Frederick Baden Warren, a bankrupt. By his order the judge directed that the appellant, Alfred Morris Wheeler, who was the respondent to the motion, should pay to the trustee in bankruptcy the sum of £963 9*s.* 3*d.* The appellant appeals from the decision, and says that no part of the sum in question is properly payable by him to the trustee in bankruptcy.

The appeal raises two points of law, either of which, if answered in the appellant's favour, is sufficient to entitle him to have the order of the county court judge discharged. The bankrupt was adjudicated bankrupt on Mar. 18, 1937, on a petition presented on Feb. 16, 1937, in respect of an act of bankruptcy which related back to Feb. 4, 1937, the receiving order having been made on Mar. 15, 1937.

There is no clear-cut finding of facts by the county court judge, but the evidence, which was by affidavit supplemented by cross-examination, shows that, immediately before the date of the receiving order, the bankrupt was, and for some time before that date had been, carrying on business as a builder. In the course of his business, he had been engaged in the erection of houses on a site in Ramsden Road, Orpington, forming part of a building estate belonging to Morris Securities, Ltd. The appellant Wheeler was the controlling personality of this company, holding practically the whole of its issued share capital. There had been at least one earlier transaction between the bankrupt and the appellant with regard to the erection of buildings on an estate at Bexley Heath, which also belonged to the company, but it is unnecessary to refer to the details of this transaction. Indeed, the judge has said that he was unable to ascertain what were its precise terms. So far as the Ramsden Road site is concerned, the bankrupt agreed to purchase that site from the company, and arranged to build four houses on it. The appellant agreed to assist in finding the necessary finance to enable the bankrupt to carry out his part of the arrangement. The arrangement made was that the appellant should guarantee in favour of the Westminster Bank, Ltd., Orpington branch, an overdraft on the bankrupt's account with the bank, and in addition make a small cash advance to the bankrupt. It was a material term of the arrangement between the appellant and the bankrupt that all moneys to be received by the builder in respect of the houses built on the site and of the site itself should be paid to a firm of solicitors named Hardman & Sons. This firm acted originally as solicitors for the appellant, and it was a further term of the arrangement that they should also act as the solicitors for the bankrupt. When the houses were erected, the land and houses were either to be sold to purchasers or to be mortgaged by the bankrupt to a building society, and the purchase money or the mortgage money, as the case might be, was to be paid to the solicitors, who were to deduct from it, first, the purchase price for the site payable to the company and to pay the sum so deducted to the company, and were then to retain the amount of their costs. After these deductions, they were to pay the balance of the purchase money or mortgage money, as the case might be, to the credit of the appellant's account at the Westminster Bank. The moneys so paid were to be applied by the appellant in reduction of the bankrupt's overdrawn account at the bank, in the relief of the appellant's guarantee to the bank. There is some doubt whether this arrangement was made before the building operations by the bankrupt on the Ramsden Road site had started or whether it was made afterwards. In any event, it was made long before the buildings were completed, and also before the transaction with the building society hereinafter mentioned was entered into. The procedure described was followed with regard to the first of the four houses built by the bankrupt on the Ramsden Road site. The bankrupt subsequently completed the remaining three of the houses on the site, and mortgaged them to the Kent Reliance Permanent Benefit Building Society for £1,400. Of this sum, £1,366 0*s.* 9*d.* was paid to the solicitors, Messrs. Hardman & Sons, on Mar. 13, 1937, being the amount of the advance, less certain fees and charges deducted by the building society. As part of the transaction, a conveyance was executed by the company in favour of the bankrupt in consideration of the purchase price, £337 10*s.* This was paid by Hardman & Sons out of the £1,366 0*s.* 9*d.* Hardman & Sons, after payment of the £337 10*s.*, were left with the sum of £1,028 10*s.* 9*d.* From this they deducted £63 1*s.* 6*d.* in respect of their own costs and disbursements, leaving the sum of £963 9*s.* 3*d.* in their hands. The money was received by Hardman & Sons on a Saturday morning, and was paid by them to the credit of the firm's clients' account. An entry of £963 9*s.* 3*d.* was made in the firm's books in favour of the bankrupt, but the solicitors state that, having regard to the arrangement, they could not, and would not, have paid any part of the £963 9*s.* 3*d.* to the bankrupt, even if he had demanded payment. On Monday, Mar. 15, 1937, before 11 a.m., the solicitors paid the £963 9*s.* 3*d.* by cheque on the firm's clients' account to the Westminster Bank, Ltd., Broadstairs, with a request to the bank to pay that sum to the appellant's account at the Orpington branch of the bank. The £963 9*s.* 3*d.* is the sum which the country court judge has ordered the appellant to pay to the trustee in bankruptcy. On the same day, but after the time of payment to the bank, the receiving order was made. Neither the appellant nor the solicitors had any notice of the fact that bankruptcy proceedings were pending at the time when the moneys were received by the solicitors, or when they were dealt with by them. As already stated, two questions arise for decision. The first is: Was the money that was received by Hardman & Sons from the building society impressed with a trust, under which they were bound to deal with it in the manner in which they did? To put the question in a slightly different form, was there, by reason of the arrangement between the bankrupt, the appellant and Hardman & Sons, an equitable assignment of the moneys received by Hardman & Sons from the building society for the purpose specified, or did the money remain the property of the bankrupt, so that he could deal with it, or direct Hardman & Sons to do so at his discretion? The second point is this. Assuming that the moneys in question remained the property of the bankrupt, was the payment of the £963 9*s.* 3*d.* into the appellant's banking account protected under the provisions of the Bankruptcy Act, 1914, s. 45?

The county court judge decided both points in favour of the trustee in bankruptcy. He held that the arrangement between the parties did not constitute a contract between them, but amounted to a mere statement of the procedure to be followed with regard to any moneys received in respect of the Ramsden Road site and the buildings thereon, and that under it the bankrupt was under no obligation to pay the moneys in question to Hardman & Sons, and that it gave no property in the money to the appellant. It was argued that this was a finding of fact by the county court judge, and that, consequently, this part of the decision could not be questioned in this court. We do not take that view. In our judgment, the county court judge found that there was an arrangement between the parties to the effect already stated. His finding that this arrangement did not constitute a contract between the parties is, in our judgment, not a finding of fact, but a conclusion of law resulting from the facts found in relation to the arrangement, and is therefore open to review in this court. We think that the conclusion of the county court judge, that the arrangement was not a contract, is untenable. The parties agreed that the moneys derived from the site with the buildings on it should be dealt with in the manner specified as part of the arrangement under which the appellant agreed to guarantee, or to continue to guarantee, the bankrupt's overdraft at the bank, and by so doing enabled the finance necessary for exploitation of the site and buildings to be obtained by the bankrupt. It is true that the appellant was bound to apply any money received by him under the arrangement in reduction of the bankrupt's overdraft, and to that extent for the bankrupt's benefit, but he had a vital interest in the particular application, for it was by this means that his liability to the bank was protected.

In our judgment, as the result of the arrangement, Hardman & Sons could not, without the joint consent of the appellant and the bankrupt, have dealt with the moneys otherwise than in accordance with the terms of the arrangement, and, if the bankrupt had directed them to pay the moneys in question to himself, or in any manner other than that authorised by the arrangement, Hardman & Sons would have been bound to refuse to do so. The case appears to us to fall within the decision in *Holroyd* v. *Marshall* (1), *Tailby* v. *Official Receiver* (2), *Brandt's* (*William*) *Sons & Co.* v. *Dunlop Rubber Co.* (3), and *Re Lind, Industrials Finance Syndicate, Ltd.* v. *Lind* (4).

Reliance was placed by Mr. Wiggins, on behalf of the trustee in bankruptcy, on the decision of the Privy Council in *Palmer* v. *Carey* (5). At first sight, the decision seems to lend support to the argument that the appellant obtained no interest in the money in question from the arrangement, but it appears to us that, if this view of *Palmer* v. *Carey* (5) be correct, it is in direct conflict with the decisions to which we have already referred. The decision was explained by MAUGHAM, J., in *Re Gillott's Settlement, Chattock* v. *Reid* (6), where he pointed out that the actual facts proved in the High Court of Australia (see 34 C.L.R. 380) show that no question of equitable assignment in fact arose, and that A consequently the case throws no doubt on the correctness of the other decisions before-mentioned.

For these reasons, we are of opinion that the county court judge was in error in holding that the moneys in question were the moneys of the bankrupt, with which he was free to deal as he desired. In our judgment, B the arrangement constituted a good equitable assignment of the moneys, and consequently those moneys could not properly be dealt with otherwise than in accordance with the arrangement. It follows that the payment by Hardman & Sons of the moneys to the credit of the appellant's banking account, in accordance with the arrangement, cannot be C impeached, because the moneys were not the moneys of the bankrupt to dispose of as he wished.

This is sufficient to dispose of the case, but, as the second point was fully argued, we think it right to deal with it. The appellant claims that the payment to his banking account (assuming the moneys so paid D were, contrary to the opinion already expressed, the free moneys of the bankrupt) is protected by the provisions of the Bankruptcy Act, 1914. s. 45. That section provides that:

> Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of E certain settlements, assignments and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy (*a*) any payment by the bankrupt to any of his creditors . . .

Then follow numerous other matters which are not material to be stated, and the section concludes with a proviso which, so far as material to the F present case, is in these words:

> Provided that both the following conditions are complied with, namely (i) that the payment . . . takes place before the date of the receiving order; and (ii) that the person (other than the debtor) to . . . whom the payment . . . was made . . . has not at the time of the payment . . . notice of any available act of bankruptcy committed by the bankrupt before that time.

G

It is admitted that the second limb of the proviso was fulfilled in the present case if the appellant was in fact otherwise within the section. The first point taken was that the section did not apply because the appellant was not a creditor. In view of the decision in *Re Paine, Ex p. Read* (7), we do not think that this point is tenable. The sub- H stantial question under the section, therefore, depends on the true meaning of the words " before the date of the receiving order." It is admitted that the payment to the appellant's bank was made in point of time before the receiving order was pronounced. It was argued by Mr. Blagden, on behalf of the appellant, both before the county court judge and in this court, that the word "date," in the phrase "before the date of the receiving order," on the true construction of the section, means the actual point of time when the order was pronounced, and does not mean the date of the day on which the order was pronounced, and which the order in fact bears. The county court judge held that the making of the receiving order was a judicial act, and that, in consequence, it was unnecessary to consider at what point of time the actual pronouncement was made, because it is a rule of law that a judicial act—and the making of a receiving order is admittedly such an act—is to be deemed to have been performed at the earliest moment of the day on which it is in fact performed. Mr. Blagden further argued that the rule is not of universal application, and called attention to a number of cases in which the court ascertained the precise moment of the performance of a judicial act in order to ascertain the rights of persons claiming to have acquired such rights at an earlier time of the day on which the judicial act was performed. The rule is stated in *Edwards* v. *R.* (8), by COLERIDGE, J., in these terms, at p. 631:

> The doctrine that judicial acts are to be taken always to date from the earliest minute of the day in which they are done, stands upon ancient and clear authority...

In that case, an adjudication in bankruptcy and appointment of an official assignee had taken place on the same day as, but at an earlier period of it than, the issue of a writ of extent against the bankrupt for a Crown debt. COLERIDGE, J., pointed out, at p. 632:

> Although the court will inquire at what time a party does an act such as filing a bill, or delivering his declaration, and for that purpose will take notice of the usual hours for sitting (see 2 LEVINZ, 141, 176; BULL'S NISI PRIUS, 137), it is otherwise with regard to a judicial proceeding. This distinction is pointed out in *Lord Porchester's* case (9) by LORD MANSFIELD, and recognised by BULLER, J., in *Pugh* v. *Robinson* (10): it is, indeed, also mentioned in the judgment of *Swain* v. *Morland* (11). The extent, according to this, operated from the first moment of the day, in the course of which the assignment was executed, and therefore must be taken to have preceded the assignment; if so, the foundation of the defendant's case fails, for until the execution of the assignment, the property as against the Crown remained in the bankrupt. If, indeed, it should be considered that the appointment of the assignees is itself also a judicial act, and not, as the conveyance by the commissioners formerly was, merely ministerial, and that it must therefore be taken, equally with the extent, to date from the beginning of the day, then the two acts will be concurrent; and it has never been disputed, nor was it contended upon the argument, but that the Crown in such case has priority over the subject. This point is too clear to need any confirmation by authority.

In *Wright* v. *Mills* (12), at p. 493, BRAMWELL, B., said, with reference to *Edwards* v. *R* (8), which was approved by the court, that the decision was supported on the principle that judicial acts shall have precedence of others. To give priority to such acts, one must suppose them to have been before the others. It is not that one does not inquire into fractions of a day, but that one gives precedence to the judicial proceeding. In *Clarke* v. *Bradlaugh* (13), LORD COLERIDGE, C.J., said, at pp. 65, 66, with reference to the rule that

> it might perhaps be also found, though it is not for us on the present occasion to decide, that even of two judicial acts done on the same day, the court would inquire, if it were necessary, which was done at the earlier time of the day.

He refused to recognise the universality of the rule even as to judicial acts. Baggallay, L.J., in the same case said, at p. 67:

> . . . the authorities seem to establish that judicial acts are referred to the first moment of the day, although I do not desire to be considered as holding this to be an inflexible rule.

Brett, L.J., said, at p. 68: A

> *Edwards* v. *R.* (8), in which the distinction is taken between the act of the party and the act of the court, is clearly binding upon us.

He also said, at p. 68:

> As for the rule that judicial acts relate back to the earliest moment of the day, B I know of no principle on which it can be founded. It is an artificial rule, declared for a long number of years to be a part of common law procedure, and therefore it is to be assumed to be as old as the common law itself.

The result of these cases seems to us to be plain, that, when there is competition in point of time between a judicial act and the act of a person —that is, a non-judicial act—the application of the rule gives precedence C to the judicial act. If, however, the competition is between two judicial acts, the actual time when each was done can be considered, and priority given to the judicial act earlier in point of time, unless there be some other ground for preferring the one act to the other, as in *Edwards* v. *R.* (8). It is unnecessary to refer in detail to the cases cited by Mr. D Blagden. It is sufficient to say that they are not in conflict with the view expressed, and are reconcilable with the authorities to which we have referred on this basis. In all of them, the competition was between two judicial acts—namely, the issue of a *fieri facias* and the doing of some other judicial act—and in none of them was preference given to a non- E judicial act at the expense of a judicial one, by reason of the fact that the non-judicial act was performed at an earlier moment of the same day than the judicial act.

In our judgment, the making of the receiving order in the present case was a judicial act, and must, in accordance with the rule, be referred F back to the earliest moment of Mar. 15, 1937, while the payment into the bank was a non-judicial act, and, although in point of time it took place earlier than did the receiving order, it cannot be treated as having been made before the receiving order.

We are therefore of opinion that the judge came to the right con- G clusion on this point. Having regard to the opinion already expressed on the first part, we hold that the judgment of the county court judge must be reversed, and the appeal allowed, with the result that the motion of the trustee in bankruptcy will be dismissed. The trustee in bankruptcy must pay the costs in this court and in the court below. The H appellant's deposit will be paid out to him.

Appeal allowed.

Solicitors: *J. D. Langton & Passmore* (for the appellant); *Braby & Waller* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

WARD *v.* LONDON COUNTY COUNCIL.

[KING'S BENCH DIVISION (Charles, J.), **March 14, 1938.**]

Negligence—Highway—Light-controlled crossing—Fire engine—Disobedience to traffic-lights—Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, *reg.* 28.

A fire engine proceeding to a fire came to a light-controlled crossing when the lights were against it. The driver, who had been sounding his gong in the usual way, seeing no vehicle upon the crossing, proceeded to cross in disobedience to the red light. The plaintiff in his car, coming along the road at right angles, with the lights in his favour, passed on to the crossing and collided with the fire engine. It was contended that, as a driver is bound by the regulations, even when the lights are in his favour, to have due regard to the safety of other users of the road, the plaintiff should have given way to the fire engine:—

HELD: the accident was caused solely by the negligence of the driver of the fire engine.

[**EDITORIAL NOTE.** As a matter of general custom, other drivers upon the highway have for many years given a right of way to fire engines proceeding to a fire. It might therefore be thought that such vehicles were entitled to some privilege at crossings controlled by lights, but it has been conceded that they are entitled to no such privilege, and, indeed, that the granting of any such privilege would not materially help them in carrying out duties where speed is a vital consideration.

AS TO NEGLIGENCE ON THE HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-644, paras. 894-904; and FOR CASES, see DIGEST, Vol. 36, pp. 59-62, Nos. 366-389.]

ACTION for damages for personal injuries sustained by reason of a collision between the car in which the plaintiffs were travelling and a London County Council fire engine.

G. Russell Vick, K.C., and *B. L. A. O'Malley* for the plaintiffs.

John Flowers, K.C., and *D'Arcy Edmondson* for the first defendant, the London County Council.

N. R. Fox-Andrews and *W. B. Frampton* for the second defendant, Allen.

CHARLES, J.: In this case, Edwin George Ward, his wife, Doris Ward, and two little boys called Donald Ernest Ward, aged 6, and John Michael Ward, aged 4, sue the London County Council and Leonard John Allen for damages which they say they sustained by reason of a collision between the car which Mr. Allen was driving, and in which they sat, with a London County Council fire engine, at the junction of Clerkenwell Road and Farringdon Road.

First of all, as to liability. Mrs. Ward says that, as they were approaching the red lights, she saw them change to green, and was amusing the two little children by pointing to these lights as they went on and off, saying "Stop" and "Off we go" to amuse them. Thus, her attention was on the lights, and they did, I am quite satisfied, turn from red to green well before Mr. Allen reached them in his car. Having got to that point, Mr. Allen says that he gave a half-turn to his right. He did not look carefully up the road, because he thought he was, and I consider that he was, entitled to believe that people would obey the red signal, which is a signal of absolute prohibition. It is not a permission to go, like the green light, which signifies : " You may go on." It is a signal of absolute prohibition. So, seeing that all was clear ahead, he passed over the road. He got halfway over when he was aware on his right of a large vehicle—he cannot say whether it was a fire engine or a car—a large red object, which swept across his front. A collision occurred, and he was turned with his engine facing down the Farringdon Road, down to the south, towards Holborn. The red object, which was a London County Council fire engine, careered on, and came to a stop something like—by general agreement—20 yds. down the south side of Farringdon Road, where it stopped on its wrong side of the road. If that evidence is correct, I consider that Mr. Allen is acquitted of blame.

The rule relevant to traffic-signs is the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, r. 28 :

> The significance of the light-signals shall be as follows : the red signal shall be taken as prohibiting vehicular traffic to proceed beyond the stop line on the carriageway provided in conjunction with the signals until the green signal is shown. The green signal shall be taken to indicate that vehicular traffic may pass the signal and proceed on or to the left or to the right with due regard to the safety of other users of the road.

It is argued by Mr. Flowers that those words " with due regard to the safety of other users of the road " put Mr. Allen in the wrong, because Mr. Allen ought to have looked carefully to the right, and, if he had looked carefully to the right, and also, I suppose, looked carefully to the left, and carefully ahead, and performed every act of perfection, before he passed on, with the green light beckoning him forward, he could have stopped and avoided the accident, and it was argued that he had not due regard for the safety of other users of the road. In my view, what the regulation means is simply this. If the red light turns to green, and there are other vehicles crossing your bows at the time, or if pedestrians are taking advantage of the red light to cross the road, and have not got to the other side, you have no business to move forward directly the green appears, to the danger of any pedestrian or any vehicle passing across the road perfectly lawfully in front of you, but not quite out of your way. You must have some regard for the safety of those people. I do not believe that it means that every driver who comes to a green light has practically to stop, and to peer up to the right and then right down to the left, because that means that you are assuming that every driver is likely to disobey the absolute prohibition of the red light while the other light is green in your favour. Mr. Allen seems to me, so far, to have done everything which is reasonable, and to have proceeded with perfect propriety.

When one comes to the story told by the driver of the fire engine—not that I accept it ; I do not believe it is true—if it were true, it would be all the worse for the London County Council. The driver says that he was proceeding down Farringdon Road from the north towards the south on his way to a fire in Hatton Garden, and he knew that he had no business to disobey the red lights. He knew it so well, he says, that, when he came to Vine Street Bridge, he practically stopped, and then proceeded at five to six miles an hour, no faster, until he got to the traffic-lights at Clerkenwell Road. There, he says, he came to a high A hoarding, which makes the crossing a blind one, so that one cannot see very far up it until one emerges from Farringdon Road into Clerkenwell Road. Then he says:

> Just as I crept out into the Clerkenwell Road I saw the car about 25 yds. away coming, in my judgment, fast.

B If that were so, all he had to do would be to arrest his progress for a fraction of a second by putting on his brakes and stopping. That would have left at least three-quarters of Clerkenwell Road free to the traffic which was lawfully proceeding in obedience to the green light. He knew that he was doing wrong, because we have the directions of the London C County Council to the drivers:

> The drivers of vehicles such as fire engines and ambulances are subject to the same obligation to obey light-signals as the drivers of other vehicles. These vehicles normally take precedence by common consent over other traffic, and it might be thought that light-signals would be likely to hamper the carrying out of emergency duties for which they are intended. In practice, however, serious difficulties do not arise. No emergency would justify the driver of a fire engine or ambulance D in taking the risk of colliding with other vehicles proceeding in accordance with the signal indications.

According to the driver's own story, that is precisely what he did. He saw this car coming across fast, at a moment when with the greatest ease he could have stopped and given the road to the car, which was E proceeding in accordance with the signal indications. No emergency would justify the driver of a fire engine in taking the risk of colliding with such a vehicle. In my judgment, the driver was taking his chance, and rushing over that crossing at a high speed, endangering other vehicles that might be in the vicinity, approaching, or designing to cross, those crossroads with the lights in their favour.

F It is said that, because he was driving a fire engine, he was in a certain privileged position. That is not so. He was not in a privileged position at all. It is perfectly true that, when the bell is clanged, people generally draw aside, but, if they do not draw aside, the driver of a fire engine has G no business to charge into them. He must use reasonable care, and get to the scene of the fire as quickly as possible. Indeed, the traffic regulations of the London County Council make it perfectly clear that that is the position which is recognised by them. The fire brigade must get there as quickly as possible, and they add, and I have no doubt rightly, H that stopping at the red signal in practice is found not to hamper the proper conduct of the fire brigade in the carrying out of its duty. The section that I have read makes that quite clear.

Judgment for the plaintiff.

Solicitors: *W. Daybell* (for the plaintiff); *J. K. Edmondson & Co.* (for the London County Council); *F. J. Stewart* (for the second defendant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HUSSEIN (OTHERWISE BLITZ) *v.* HUSSEIN.

[Probate, Divorce and Admiralty Division (Henn Collins, J.), **March 21, 1938.**]

Divorce—Nullity—Duress—Ceremony performed in England—Jurisdiction—Fear of respondent—Incapacity to resist.

The petitioner, a girl of 18 years of age, was, on Oct. 10, 1933, induced to go through a ceremony of marriage with the respondent, an Egyptian subject, by reason of his continually threatening to kill her if she refused. The marriage was never consummated :—

Held : the petitioner's consent was obtained by pressure improperly brought to bear upon her, and a decree of nullity ought to be pronounced.

[**EDITORIAL NOTE.** It will be noted that the respondent in this case was an Egyptian subject and at present employed there, but that is not held to be a bar to the jurisdiction.

As to Duress as a Ground of Nullity, see HALSBURY, Hailsham Edn., Vol. 10, p. 639, para. 934 ; and for Cases, see DIGEST, Vol. 27, pp. 38, 39, Nos. 142-152.]

Case referred to :

(1) *Scott* v. *Sebright* (1886), 12 P.D. 21 ; 27 Digest 38, *143* ; 56 L.J.P. 11 ; 57 L.T. 421.

Undefended petition for nullity on the ground of duress. The petitioner, Estella Henrietta Hussein (otherwise Blitz), went through a ceremony of marriage with Mohamed Hussein Mohamed, an Egyptian subject, at the registrar's office, Brentford, on Oct. 10, 1933. The marriage had not been consummated, and the parties had never cohabited. The respondent was at the time of the hearing a railway official in Egypt. The fifth and sixth paragraphs of the petition were as follow :

> That your petitioner was induced to be a party to the said pretended ceremony of marriage not of her own free will but through fear, duress and terror of the respondent.
>
> That for some time before the date of the said ceremony of marriage the respondent continually threatened to kill your petitioner, who was then 18 years of age, if she did not marry him, and your petitioner believed that the respondent would carry out the said threats.

The petitioner, in giving evidence supporting the petition, produced a copy of a document containing a list of given conditions which the respondent had prepared and made her sign :

> I, undersigned Estella, agreed to marry M. on the following conditions :
>
> 1. I know well that he is an old-fashioned Egyptian and I know all about the Egyptian habits and character and I promise to follow all these habits and character without any exceptions.
>
> [There followed undertakings by the petitioner not to go out without her husband, not to have men or boy friends, or to write to any person, male or female.]
>
> 7. I confess that I write these conditions with my own wish and without any obligation from any side, and that I am conscious and responsible and if I break any of these conditions I have to separate and have no right to claim any remedy from M. at any court whether Egyptian or English.

R. F. Bayford, K.C., and *Elliot Gorst* for the petitioner.

Henn Collins, J. : The wife's story is an amazing one, but I accept it. In ninety-nine cases out of a hundred, it would be almost impossible to accept such a story, but to my mind her evidence is corroborated in material respects. I think that the respondent's conduct clearly amounted to threats. The law is stated in the judgment of BUTT, J., in *Scott* v. *Sebright* (1), at p. 24 :

> It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger.

As I have said, I believe the petitioner's evidence. It is obvious from the document which she was made to sign that this man was avid of power over this girl of eighteen, that he exercised the power he had over her, and coerced her. I am satisfied of that.

Decree granted.

Solicitors : *Canter, Hellyar & Co.* (for the petitioner).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

Re SPRACKLAN'S ESTATE.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **April 5, 1938.**]

Wills—Revocation—By instrument in writing—Direction to destroy—Wills Act, 1837 (*c.* 26), *s.* 20.

A testatrix, who had made a will about a month before her death and at a time when she was seriously ill, dictated a document which was duly attested in the manner in which a will should be, containing the following words : " Will you please destroy the will already made out." The document was addressed to the manager of a bank, in whose custody the will had been placed :—

HELD : the wording of the document showed a sufficient intention to revoke the will within the meaning of the Wills Act, 1837, s. 20.

[**EDITORIAL NOTE.** The court have here applied the decision in the case of *In the Goods of Durance* (1). A little difficulty was felt in that a direction to destroy does not necessarily show an intention to revoke, but the court felt itself bound by the earlier decision, which has stood for so long without question.

AS TO VOLUNTARY REVOCATION, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 563-575, paras. 1120-1144 ; and FOR CASES, see DIGEST, Vol. 44, pp. 347, 348, Nos. 1762-1781.]

Case referred to :

(1) *In the Goods of Durance* (1872), L.R. 2 P. & D. 406 ; 44 Digest 347, *1776* ; 41 L.J.P. & M. 60 ; 26 L.T. 983.

APPEAL from an order of Mr. Registrar LONG, dated Sept. 22, 1937, whereby he decided that a will was not revoked by a direction in writing to the person in whose custody the will had been left that he should destroy it. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

F. Suttill for the appellant.

Evans Jackson for the respondent.

Sir Wilfrid Greene, M.R. : This is a curious case, and not without difficulty. The testatrix had made a will under which she appointed the present respondent, Thomas Dunning, sole executor and the residuary legatee. About one month before she died, she was seriously ill, and she dictated to a tenant in the same house a document, which was signed by her and signed by that tenant, Mr. Harrison, and his wife, in a proper way, in the presence of one another and in the presence of the testatrix. That document, which is addressed to Mr. Knight, a manager of a bank with whom she had deposited the will, is as follows :

> To Mr. Knight. Dear Sir, I, Mr. Harrison, have undertaken to pay all debts as I am a tenant in this house and Miss Spracklan Geve [the name by which she was described] wishes me to do this for her sake and will you please destroy the will already made out.

Thus, the document, signed and attested in the way I have indicated, contains a clear and definite direction, to the person in whose custody the will was, to destroy the will. Of course, if destruction were the method by which the will was to be got rid of, destruction by Mr. Knight would not have been effective for that purpose unless he had destroyed it in the presence of the testatrix. Under the Wills Act, 1837, s. 20, wills may be revoked :

> by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

If the matter had been new, and free from any authority, I should have thought that an intention or a direction to get rid of the will by destruction could not be construed as an intention to revoke within the first limb of the section, because an intention to revoke is one which must be effected by force of the language used. However, I find that in 1872 Lord Penzance, in *In the Goods of Durance* (1), had before him a document not dissimilar to that in the present case. That was a case where there was a letter addressed by the testator to his brother, and signed in the presence of two witnesses, who executed it in accordance with the law of the place where the will was made, which happened to be Ontario, in Canada. The letter, in which was enclosed an order to a solicitor, who held the will, to hand it over to the brother, said, " Please burn as soon as you receive it without reading it." Lord Penzance said, at p. 407 :

> The question is, whether the will is not revoked by the letter. If a man writes to another " Go and get my will and burn it," he shows a strong intention to revoke his will. In the language of sect. 20 of the Wills Act, the letter is a writing declaring an intention to revoke the will, and it is duly executed.

I certainly should not wish to depart from an authority which has stood for so many years, and which has apparently stood without criticism, either in subsequent cases or in the textbooks, unless I were quite satisfied, on the true construction of the section, that the authority was wrongly decided. I certainly cannot take the view that the words of the section are not fairly susceptible of the interpretation which LORD PENZANCE put upon them: That being so, I propose to follow that decision, and to hold that, in the present case, the letter in question does indicate a declaration of an intention to revoke the will. The result of that is that there is no will left in existence, and the proper procedure is to grant letters of administration to the applicant. The appeal, therefore, must be allowed, and letters of administration granted to the applicant.

SCOTT, L.J.: I agree. The question, of course, is whether or not the existence of the letter of Apr. 2 does disclose a declaration in writing of an intention to revoke the will. To what SIR WILFRID GREENE, M.R., has said in regard to *In the Goods of Durance* (1) I have nothing to add, but I think that it is worth while noting that the first three lines of the letter in question refer to an arrangement made with regard to all her debts, Mr. Harrison having undertaken to pay them. That does show that in fact by this letter she was intending to take definite action in regard to the disposition of her property and the arrangements to come into effect upon her death. That, to my mind, does confirm the interpretation which SIR WILFRID GREENE, M.R., has put upon it, and helps to support the view that the letter was intended as a declaration of intention then and there to revoke the will. At first sight, I thought that the statement she made after she had dictated the letter which is mentioned in the affidavit of Mr. Harrison of Sept. 2, 1937, " If anything happens will you please take this to Mr. Knight," rather tended to show that she was not intending to act then and there upon the idea of destroying the will, but could leave it until after she was dead, and that might raise a doubt as to whether there was a present intention to revoke. I think the answer to that doubt is that it corroborates the interpretation that it was a present intention to revoke, because the true meaning to be put upon the additional observation that she made is, I think, " You can tell Mr. Knight when I am dead that I have revoked the will which is in his possession, and that therefore he may destroy it." I have therefore come to the conclusion that there is nothing to displace the application of the rule laid down in *In the Goods of Durance* (1), and I therefore think that this document did effect the revocation of the will.

MACKINNON, L.J.: I concur, and I do not think that I need add anything.

Appeal allowed. Letters of administration granted to the applicant.

Solicitors: *Bickerton Pratt* (for the appellant); *Trevor Jones & Co.* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

THE TERNEUZEN.
MARSH *v.* LENSEN SHIPPING, LTD.

[Probate, Divorce and Admiralty Division (Henn Collins, J.), **March 16, 17, 25, 1938.]**

Shipping—Seamen's wages—Wreck or loss of ship—Ship abandoned some time after original injury—Date of wreck—Merchant Shipping (International A *Labour Conventions) Act,* 1925 (*c.* 42), *s.* 1 (1).

The plaintiff was first mate on board the Terneuzen under articles the terms of which were not to extend beyond June 30, 1937, or the first arrival of the ship in the United Kingdom after such date or the discharge of cargo consequent upon such arrival. On Jan. 27, 1937, the Terneuzen, while proceeding to the port of Setubal, was driven ashore B and badly damaged, and could not be refloated. She was ultimately sold as she lay. The whole crew continued to render services until Feb. 16, 1937, when some were discharged, while others, including the plaintiff, continued to serve until May 5, 1937, when they were paid off, as the owners then decided to abandon the ship. The plaintiff was unemployed for a period after May 5, 1937, and this period was represented in money by the amount of his claim, £36 10*s*. He made his claim under C the Merchant Shipping (International Labour Conventions) Act, 1925, s. 1 (1). The question which had to be determined was the date from which the period of two months mentioned in the Act was to run, and this question depended upon when his services terminated by reason of the wreck within the meaning of the section. It was admitted upon the authority of *The Olympic* (1) that there was a wreck within the D meaning of the section. The defendants contended, first, that the wreck occurred when the ship stranded on Jan. 27, 1937, and that the plaintiff's agreement then ended, and, secondly, that his services after this date were rendered under an agreement to be implied, not from the articles, but from the relationship which those articles created :—

Held : (i) the question of wreck or no wreck does not rest with the owners, but the action of the owners is a material fact to be considered E in determining the question.

(ii) a wreck is a physical injury to the ship by perils of the sea causing the frustration of the venture.

(iii) there was no wreck until May 5, 1937, when the vessel was actually abandoned by the force of circumstances, and the plaintiff succeeded in his claim.

(iv) if the true view was that the wreck occurred at the moment the F vessel went ashore, then the seamen served thereafter under an obligation to be implied from the articles.

[**EDITORIAL NOTE.** The question in this case turns upon the interpretation of the words "wreck or loss" in the Merchant Shipping (International Labour Conventions) Act, 1925, s. 1 (1). Such a loss must be one due to the perils of the sea, G and must result in the frustration of the voyage. The time of such a loss is not the time at which the first injury is inflicted, but the time when the owners reasonably determine that it is not practicable to repair the ship. That is not to say that the question is solely one for the owners to determine. The question is a question of fact for the court, but the fact that the owners determine to abandon the voyage is strong evidence that there has been a "wreck or loss" within the meaning of the H section, provided that they have reasonable grounds for that determination.

As to Wreck or Loss of Ship, see HALSBURY, Supp., Shipping, para. 76; and for Cases, see DIGEST, Vol. 41, pp. 228-230, Nos. 666-685.]

Cases referred to :

(1) *The Olympic*, [1913] P. 92 ; 41 Digest 229, *680* ; 82 L.J.P. 41 ; 108 L.T. 592.
(2) *Lloyd* v. *Sheen* (1905), 93 L.T. 174 ; 41 Digest 222, *602*.

(3) *Ellerman Lines, Ltd.* v. *Murray, White Star Line of Royal & United States Mail Steamers Oceanic Steam Navigation Co., Ltd.* v. *Comerford,* [1931] A.C. 126; Digest Supp.; *sub nom. The Croxteth Hall, The Celtic,* 100 L.J.P. 25; 144 L.T. 441; *affg.* S.C., [1930] P.197.

(4) *The Elizabeth* (1819), 2 Dods. 403; 41 Digest 252, *939.*

A (5) *The Warrior* (1862), Lush. 476; 41 Digest 229, *669*; 6 L.T. 133.

ACTION referred to the High Court by magistrates under the Merchant Shipping Act, 1894, s. 165 (iii). The plaintiff's claim is founded on the Merchant Shipping (International Labour Conventions) Act, 1925, B s. 1 (1). The facts are fully set out in the judgment.

J. V. Naisby for the plaintiff.

Marquess of Reading, K.C., and *Harvie Watt* for the defendants.

HENN COLLINS, J.: This action comes before the High Court in C pursuance of a reference by the magistrates under the Merchant Shipping Act, 1894, s. 165 (iii).

The plaintiff's claim is founded upon the Merchant Shipping (International Labour Conventions) Act, 1925, s. 1 (1), and the circumstances which give rise to it are as follow. The plaintiff was serving as first D mate on board the Terneuzen under articles relating to a voyage or voyages between certain degrees of latitude, trading to and fro as required, term not to extend beyond June 30, 1937, or the first arrival of the ship in the United Kingdom after such date, or the discharge of cargo consequent upon such arrival. The date upon which his services would, in the ordinary course, have ceased was therefore on or shortly E after June 30, 1937.

On Jan. 27, 1937, the Terneuzen, whilst proceeding in ballast to the port of Setubal, was driven ashore by stress of weather near that port. Her hull was buckled, and her engines disabled, and, despite the efforts F of salvors to refloat her, she remained where she had settled. She was ultimately sold as she lay, in the interests of whom it might concern. Meanwhile, the whole crew continued to render such services as were required of them until Feb. 16, 1937, when some were discharged. The others, including the plaintiff, continued to serve until May 5, 1937, G when the remaining men, including the plaintiff, were paid off, in pursuance of the owners' decision to abandon the ship. The plaintiff was unemployed for a period after May 5 which, in terms of money, is correctly represented by the amount of his claim in this action—namely, £36 10*s.*

The Merchant Shipping (International Labour Conventions) Act, 1925, H s. 1 (1), under which the plaintiff's claim is made, provides as follows:

> Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in the Merchant Shipping Act, 1894, s. 158, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date.

The question therefore is as to the date from which the period of two months is to run, and this, in turn, depends upon when his services terminated by reason of the wreck, within the meaning of the section. *Prima facie*, one would suppose that his services, which would no doubt mean services under his contract, terminated when, by reason of what had happened, he was discharged earlier than he would have been in the normal course. The plain purpose of the section seems to be to provide against a period of unemployment arising from curtailment of the contemplated voyage by means of the wreck of the ship, and, unless I am constrained by authority to defeat what I think is its purpose, I ought not to do so. That there was a wreck within the meaning of the section is admitted, as it had to be upon the authority of *The Olympic* (1). In that case, in construing the word "wreck" in the Merchant Shipping Act, 1894, s. 158, where the word occurs in the same collocation as it does in the section under discussion in this case, Vaughan Williams, L.J., defined it in these terms, at p. 103 :

> I think the word "wreck" means something less than total loss. I think that, in determining whether the wreck in question has terminated the service of the seaman, the tribunal which has to determine this question must first satisfy itself that the damage, which is alleged to have terminated the service, is physical damage caused at sea by perils of the sea to the ship ; and, secondly, that such damage, although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture.

The word was defined in similar, though slightly narrower, terms by Buckley, L.J. It is to be observed that the definition postulates a concatenation of three circumstances : perils of the sea, a physical injury to the ship, and consequent frustration of the commercial adventure. That chain was completed in this case.

It is also to be observed that the court in that case was not determining the point of time when the wreck occurred, much less the point of time when the seamen's services were terminated by reason of it, but was only concerned to decide whether what had happened amounted to a wreck or a loss of the ship within the meaning of the section. The defendants say, however, that the wreck occurred *uno flatu* when the ship stranded, and that, at that moment, the venture was lost, and the wreck accomplished, and the plaintiff's agreement ended. It is true that, in the light of subsequent knowledge, one can say that the ship was so stranded that the venture was ultimately lost ; but it is equally true that, if, on the stranding, the question had been put whether or not the venture was lost, the answer would have been "No," because efforts to accomplish it were continued for long after the stranding. I do not think that the third link in the chain, the loss of the venture, is to be determined *ex post facto*, by only the physical condition and topographical position of the ship at the moment the casualty occurs. Account must also be taken of the reaction of the owners to circumstances which are not apparently fatal, or, in simpler language, there is no wreck until the venture is in fact abandoned by force of the circumstances. In saying this, I wish to guard myself from being understood to say that the question of wreck or no wreck rests with the owners. This would be contrary to what is said by Lord Alverstone, C.J., in *Lloyd* v. *Sheen* (2), where he says, at p. 179:

> It cannot mean that the question whether there is a wreck or loss for this purpose is to depend upon the particular view taken by underwriters; it has to depend upon the facts.

That passage, however, does not exclude the action of the owners as one of the material facts to be considered, nor does it constrain me to say that the voyage was at an end at the time when all concerned were doing all they could to prosecute it. The date upon which the vessel was finally and inevitably abandoned is taken, for the purpose of this case, as May 5, 1937. I can find nothing in the cases which have been cited which militates against this view, and, if that were all, I should conclude in favour of the plaintiff.

Before parting with the case, however, I ought to advert to another and dependent argument upon which the defendants relied. They say that the wreck which occurred on Jan. 27 put an end to the voyage, and therefore to the plaintiff's service under his agreement, and that his services thereafter were rendered under an agreement to be implied, not from his articles of agreement, but from the relationship which those articles created. In my judgment, this distinction is not supported by authority. It is true to say in general terms that the wages of a seaman cease on the wreck of his ship (see, for instance, the judgment of Scrutton, L.J., in *The Celtic* (3)), but, if I am right in thinking that the wreck for this purpose has not taken place till the last link in the chain has been forged by the submission of the owners to the force of circumstances, it requires no implication, either from the articles or from any more nebulous material, to account for an obligation upon the seamen to continue their services after the happening of such a misfortune as that which overtook the Terneuzen. If, however, the true view is that the wreck occurred at the moment the ship went ashore, then I think that the seamen served thereafter under an obligation to be implied from the articles. Not only is it essential to the safety of the ship that there should be such an obligation, so that there are ample grounds for implying it in order to give the articles a business efficiency, but also I think that *The Elizabeth* (4) and *The Warrior* (5) both bore out the contention that the obligation springs from the contract. Indeed, in *The Warrior* (5), Dr. Lushington says so in terms, at p. 482; and the comments, both of Buckley, L.J., in *The Olympic* (1), and of Kennedy, L.J., in his dissentient judgment in the same case, upon *The Elizabeth* (4), enforce that view. I therefore give judgment for the plaintiff for the amount claimed.

Judgment for the plaintiff with costs.

Solicitors: *Rehder & Higgs* (for the plaintiff); *Botterell & Roche* (for the defendants).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

METCALFE *v.* LONDON PASSENGER TRANSPORT BOARD.

[King's Bench Division (Macnaghten, J.), **March 24, 25, April 1, 1938.]**

Master and Servant—Common employment—Amalgamation of undertakings—Transport vehicles—Whether doctrine applies to transport vehicles en route.

The plaintiff was a bus conductor who was injured as a result of a collision between his bus and a tram, due to the negligence of the tram driver. Both the plaintiff and the tram driver were in the employ of the London Passenger Transport Board, and it was contended that the doctrine of common employment applied. Against this contention, it was argued that, as the crews of two ships belonging to the same company were not in common employment, the doctrine was not applicable to these circumstances. The plaintiff had been in the service of the London General Omnibus Co. before that company was absorbed in the London Passenger Transport Board :—

Held : the doctrine of common employment applied, and the plaintiff was not entitled to recover.

[**EDITORIAL NOTE.** The amalgamation of transport undertakings in London and other large cities has had the effect of enormously increasing the number of fellow-servants of an employee of one of the undertakings absorbed. It might have been doubted whether an employee originally in the service of one of the absorbed companies would be barred by the doctrine of common employment from recovering damages for the negligence of a servant of the amalgamated undertaking. It is here held that the doctrine is applicable, and the analogy of crews of ships belonging to the same company is rejected.

As to Common Employment, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-193, paras. 322-325 ; and for Cases, see DIGEST, Vol. 34, pp. 207-217, Nos. 1679-1789.]

Cases referred to :

(1) *The Petrel,* [1893] P. 320 ; 34 Digest 213, *1757* ; 62 L.J.P. 92 ; 70 L.T. 417.

(2) *Radcliffe* v. *Ribble Motor Services, Ltd.*, [1938] 1 All E.R. 71 ; Digest Supp. : 107 L.J.K.B. 209.

(3) *Priestley* v. *Fowler* (1837), 3 M. & W. 1 ; 34 Digest 202, *1647* ; 7 L.J. Ex. 42.

(4) *Bartonshill Coal Co.* v. *McGuire* (1858), 3 Macq. 300 ; 34 Digest 126, *972* ; 31 L.T.O.S. 258.

(5) *Morgan* v. *Vale of Neath Ry. Co.*, (1865), L.R. 1 Q.B. 149 ; 34 Digest 212, *1750* ; 35 L.J.Q.B. 23 ; 13 L.T. 564.

Action for damages for personal injuries caused through the alleged negligence of the defendants' servant. The facts are fully stated in the judgment.

Sir William Jowitt, K.C., and *Montague Berryman* for the plaintiff.

R. P. Croom-Johnson, K.C., *N. R. Fox-Andrews*, and *B. J. M. Mackenna* for the defendants.

Macnaghten, J. : In this action, the plaintiff, Frederick Henry Metcalfe, a bus conductor in the employment of the defendants, the London Passenger Transport Board, sues his employers for negligence. The facts giving rise to his claim are short and simple.

On the afternoon of July 2, 1937, a tram belonging to the defendants and driven by one of their servants collided with a stationary bus at the junction of Bowes Road and Green Lanes in North London. The plaintiff was the conductor of the bus, and was standing on his platform at the time of the accident. In consequence of the collision, he sustained very serious personal injuries, and he brings this action to recover damages by way of compensation, alleging that the accident was caused by the negligence of the driver of the tram.

The plaintiff's bus was one of the line of buses on the route No. 112, from Palmers Green to Kew Gardens, a distance of about 15 miles. The buses serving that route, on leaving the bus-stand outside the Palmers Green garage, turn to the left, down Green Lanes, a road 40 ft. wide with a double set of tram-lines in the middle. They go along Green Lanes to the junction with Bowes Road, a distance of about 40 yds., and then turn to the right into Bowes Road.

The plaintiff's bus set out on its journey from Palmers Green garage to Kew Gardens at about 6.30 p.m. It left the bus-stand opposite the garage, turned into Green Lanes, and proceeded to the junction with Bowes Road. There are traffic-lights at the junction, and, when the bus reached that place, the lights were against it. The driver of the bus accordingly stopped at the prescribed line, and, since the bus would have to turn to the right into Bowes Road so soon as the green light appeared, he stopped the bus on the near-side tram-lines. While he was waiting for the change of the lights, the tram crashed into the rear of the bus, and the plaintiff was very badly injured.

By their defence, the defendants denied the alleged negligence, and pleaded alternatively common employment. However, by a letter dated Mar. 3, 1938, the alleged negligence of the driver of the tram was admitted, and therefore the plea of common employment is the only defence now raised before me.

At the time of the accident, both the plaintiff and the driver of the tram were in the employment of the London Passenger Transport Board, the one as a bus conductor and the other as a tram driver, and both were engaged in the work of their employers—namely, the transport of passengers by road or rail. It is undeniable that the plaintiff and the driver of the bus were in common employment, so that, when the accident happened, if the driver of the bus had been the person to blame for the accident, the plaintiff could not have maintained any action for his negligence against their common master, and it was conceded that, while the buses or trams belonging to the defendants are in their respective garages, all the servants of the defendants attending those vehicles at the garage, whether as drivers or as conductors or in any other capacity, are in a common employment, so that no action could be maintained in respect of any injury caused to any one of them at the garage by the negligence of any other. It was argued, however, that, so soon as a tram or bus emerges from its garage into the public street it becomes an independent unit, and that the driver and conductor of that tram or bus are not in common employment with the driver and conductor of any other tram or bus belonging to the defendants. This argument was based mainly, if not entirely, on the decision of SIR FRANCIS JEUNE, P., in the case of *The Petrel* (1). In that case, there had been a collision in the Thames estuary between two ships belonging to the same owner, and Sir Francis Jeune, P., held that the crews of those vessels were not in common employment. I do not think that the suggested analogy between vessels at sea and public vehicles in the streets holds good, but in any case I am bound, by the decision of the Court of Appeal A in *Radcliffe* v. *Ribble Motor Services, Ltd.* (2), to reject that argument. In *Radcliffe's* case (2), two buses belonging to the same company were returning empty to their garage, when the driver of one of the buses was killed by the negligence of the other. The accident happened in a public street in Liverpool, some distance from the garage, and the Court B of Appeal held that the two drivers were in common employment, and that no action was maintainable against the company. If, in the present case, the collision had occurred between two of the buses on the No. 112 route, the case would, I venture to think, have been too plain for any argument. Can it make any difference that the collision in fact occurred C between a bus and a tram at a place where their respective routes coincided ? The doctrine of common employment rests on the basis that the servant undertakes, as between himself and his master, to run all the ordinary risks of his service, including the risk of negligence on the part of a fellow-servant ; and, in my view, all the authorities to D which reference has been made—namely, *Priestley* v. *Fowler* (3), *Bartonshill Coal Co.* v. *McGuire* (4), and *Morgan* v. *Vale of Neath Ry. Co.* (5) —confirm the view that all the servants of a road transport company must be in common employment when engaged on the company's business. Whether on the company's premises or on the public roads, they E are persons in common employment.

The plaintiff was formerly in the service of the London General Omnibus Co. He entered their employment in 1930, and, when the London Passenger Transport Board was created by the London Passenger Transport Act, 1933, and all the passenger transport undertakings in F London were amalgamated, by virtue of sect. 73 of that Act, he was transferred from the service of his former employers to that of the defendants. If this accident had happened before that transfer took place, the defence of common employment would not have been available, because the tramways in Green Lanes then belonged to the G Middlesex County Council, and it was suggested, rather faintly, that this fact had some bearing on the matter. I am unable, however, to see that it affects this case in any way. The effect of the Act was, no doubt, to increase enormously the number of the plaintiff's fellow-servants, but whether a servant has but one fellow-servant or ten thousand cannot H affect the application of the doctrine of common employment. In my view, the defence which has been pleaded must prevail, and I am bound to dismiss the action.

I have been asked, in view of the possibility that my decision may be reversed on appeal, to assess the damages to which the plaintiff would, in my opinion, be entitled, if his claim were upheld. The special damages, including his loss of wages down to the date of the trial, have been agreed at £215. The task of assessing the general damages in such a case as this is very difficult. The injuries which the plaintiff sustained were very serious. He was taken to the North Middlesex County Hospital, and it was found necessary to amputate the left leg midway between the ankle and the knee. There was a compound fracture of the tarsal bones of the other foot, and that foot will always be deformed. The plaintiff was in hospital from July 2 to Aug. 11, when he was transferred to the out-patient department. He has, of course, suffered a great deal of pain, and he is not yet free from pain. He is 32 years of age, and has a wife and one child to support. They live at 36, Cherrydown Avenue, South Chingford, in a house which the defendant bought for £700. The purchase money was advanced by a building society, and the plaintiff is under an obligation to repay the advance by monthly instalments of £4 8*s.* 9*d.*, about two-thirds of which instalments are still to be paid. The wages of the plaintiff, as a bus conductor, were £4 16*s.* per week, and there is every reason to expect that, but for this accident, he would have remained permanently in the employment of the defendants, for, judging by his appearance in the witness-box, he has in a marked degree the qualities required in that occupation : intelligence, alertness, patience and politeness. He can never resume his old occupation. The disability caused by the accident compels him to pursue a sedentary life, and it is at least doubtful whether he will be able to find any employment at all. Even if he can find employment, he has lost much of the enjoyment of life.

In such a case as this, a secured pension would seem to be the fairest way of compensating the plaintiff—fair to the employers and fair to the plaintiff—but the court has no power to make such an order except with the consent of the parties, and such consent is not given in this case. Accordingly, I must fix a lump sum, which, in the events that will happen, may be too much or may be too little. In view of the uncertainty of life, and the contingencies which are beyond any calculation, no one can say what is a fair and adequate compensation to the plaintiff, but, in my view, I think that the sum of £3,500, in addition to the amount of the special damages—which have been agreed, as I have said, at £215—making a total of £3,715, would be fair and reasonable compensation.

I can only express regret that the law is such that this plaintiff, who is crippled for life, is not entitled to any compensation for his injury, but, for the reasons already given, there must be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors : *Pattinson & Brewer* (for the plaintiff) ; *Solicitor to the London Passenger Transport Board* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re A DEBTOR (No. 21 of 1937), THE PETITIONING CREDITOR *v.* THE DEBTOR.

[Chancery Division (Luxmoore and Morton, JJ.), **April 4, 11, 1938.]**

Bankruptcy—Petitioning creditor's debt—Judgment debt—Part of debt unenforceable in bankruptcy—Debt of married woman incurred before Aug. 2, 1935—*Law Reform (Married Women and Tortfeasors) Act*, 1935 (*c.* 30), *s.* 4 (1)(*c*).

The debtor incurred a debt of £77 5*s.* to the petitioning creditor, of which £5 5*s.* was incurred before Aug. 2, 1935, the date of the coming into operation of the Law Reform (Married Women and Tortfeasors) Act, 1935. £4 was paid in respect of the debt, and the petitioning creditor then sued for the balance and obtained a judgment for £78 18*s.* 6*d.*, debt and costs, which was drawn up in the form applicable to a contract entered into after Aug. 2, 1935. It was contended that a petition could not be based upon this judgment as part of it was in respect of goods supplied to her before Aug. 2, 1935:—

Held: while it was true that part of the debt could not be enforced in bankruptcy, yet, if that part was eliminated, a sum in excess of £50 remained due to the creditor, and a receiving order ought to be made.

[**EDITORIAL NOTE.** It was here argued that a bankruptcy notice cannot be issued in respect of a debt which is in part unenforceable by bankruptcy proceedings. The court has, however, held that, where the part of the debt enforceable by bankruptcy proceedings is over £50, the notice is one upon which a petition may be founded.

As to Amount of Petitioning Creditor's Debt, see HALSBURY, Hailsham Edn., Vol. 2, pp. 56-58, paras. 69, 70; and for Cases, see DIGEST, Vol. 4, pp. 113-126, Nos. 1025-1148.]

Cases referred to:

(1) *Re A Debtor* (*No.* 478 *of* 1908), *Ex p. Debtor*, [1908] 2 K.B. 684; 4 Digest 99, *898*; 77 L.J.K.B. 981; 99 L.T. 458.

(2) *Re Debtor, Ex p. Petitioning Creditor*, [1917] 2 K.B. 60; 4 Digest 144, *1345*; 86 L.J.K.B. 745; 116 L.T. 581.

(3) *Re Vitoria, Ex p. Vitoria*, [1894] 2 Q.B. 387; 4 Digest 133, *1218*; 63 L.J.Q.B. 795; 71 L.T. 48.

(4) *Re Fraser, Ex p. Central Bank of London*, [1892] 2 Q.B. 633; 9 Morr. 256; 4 Digest 324, *3038*; 67 L.T. 401.

(5) *Re Lennox, Ex p. Lennox* (1885), 16 Q.B.D. 315; 4 Digest 325, *3054*; 55 L.J.Q.B. 45; 54 L.T. 452.

(6) *Forster* v. *Baker*, [1910] 2 K.B. 636; 8 Digest 428, *68*; 79 L.J.K.B. 664; 102 L.T. 522; *affg.* S.C. *sub nom. Bowles* v. *Baker*, 26 T.L.R. 243.

(7) *Re A Debtor* (*No.* 627 *of* 1936), [1937] Ch. 156; [1937] 1 All E.R. 1; Digest Supp.; 106 L.J.Ch. 172; 156 L.T. 95.

Appeal from an order made by the registrar of the Guildford County Court on Feb. 10, 1938, dismissing a bankruptcy petition presented against a debtor by one Leonard George Rosier. The creditor appealed from that order and asked that a receiving order should be made on his petition against the debtor.

V. R. Aronson for the appellant.

G. F. Kingham for the respondent.

Aronson: The judgment obtained against a married woman for an amount included a debt incurred before the passing of the Law

Reform (Married Women and Tortfeasors) Act, 1935, and a bankruptcy notice was served on the debtor. All the articles except one in respect of which payment was claimed were supplied after the Act of 1935 came into force. [Counsel referred to *Re Debtor, Ex p. Petitioning Creditor* (2), *Forster* v. *Baker* (6), *Re A Debtor* (*No.* 478 *of* 1908) (1).]

Kingham : This is not a case of a bankruptcy notice being for too much, but one of a notice being in part for a debt which cannot be the subject of a bankruptcy notice. Before 1913, any mistake as to the amount in a bankruptcy notice was held to be fatal. In that year, an Act was passed which required the debtor, if the amount stated was too much, to give notice within 7 days. In the present case, there is a debt included which cannot be enforced in bankruptcy at all, because the debt was due before Aug. 2, 1935. A bankruptcy notice cannot be partly good and partly bad, and it cannot be amended in the circumstances of the present case. [Counsel referred to *Re A Debtor* (*No.* 478 *of* 1908), *Ex p. Debtor* (1) and *Re A Debtor* (*No.* 627 *of* 1936) (7).]

LUXMOORE, J. [delivering the judgment of the court] : The debtor is, and was at all material times, a married woman. During the years 1935 and 1936 she bought from the creditor a number of furs to a total value of £77 5*s*. The earliest transaction was the purchase on May 11, 1935, of a fur cape for £5 5*s*. The subsequent transactions all took place after Aug. 2, 1935, the date on which the Law Reform (Married Women and Tortfeasors) Act, 1935, was passed. Small payments amounting to £4 in all were made by the debtor before Jan. 11, 1937, and on that date the creditor started proceedings against the debtor in the Guildford County Court to recover the balance then due—namely, £73 5*s*.

On Feb. 11, 1937, the creditor obtained judgment against the debtor in those proceedings for the sum of £73 5*s*. and £5 13*s*. 6*d*. for costs, making together the total sum of £78 18*s*. 6*d*. The judgment was in accordance with Form No. 138 of the County Courts Forms, 1936. The form is entitled :

> Judgment or order against a married woman on contract entered into before Aug. 2, 1935.

There appears to be an obvious clerical error in this title, in that judgment in this form appears to be plainly applicable to a contract entered into after Aug. 2, 1935, and not to a contract entered into before that date, for by R.C.C., Ord. 24, r. 3, it is provided :

> a judgment or order against a married woman shall be in such one of the forms in the appendix as would be applicable if she were a *feme sole* unless the court otherwise directs, provided that (*a*) where the judgment or order is in respect of a contract entered into, or a debt or obligation incurred before Aug. 2, 1935, the minute of the judgment or order shall contain a note showing that the contract was entered into or the debt or obligation incurred before that date, and that the judgment or order is not enforceable otherwise than against the property of the married woman ; and (*b*) in any particular case, the court may, if it thinks fit, direct that the judgment or order shall be in Form 138.

In the present case, as appears from the particulars already mentioned, part of the money claim dealt with by the judgment was in respect of a debt incurred by a married woman before Aug. 2, 1935, and the remainder of it was in respect of debts incurred by the married woman after that date. Strictly speaking, the judgment should have noted this fact, and should have noted that, at any rate so far as concerned the particular part of the sum, in respect of which judgment was obtained, referable to the earliest contract, the judgment could not be enforced otherwise than against the married woman's property. This was not done, and the judgment is in fact in the form applicable to the case where the whole of the sum recovered is due by a married woman in respect of a debt incurred after Aug. 2, 1935.

The order of Feb. 11, 1937, is as follows:

> It is adjudged that the plaintiff [the appellant] do recover against the defendant [the debtor] the sum of £73 5*s.* for debt and £5 13*s.* 6*d.* for costs amounting together to the sum of £78 18*s.* 6*d.* It is ordered that the defendant do pay the sum of £78 18*s.* 6*d.* to the registrar of this court by instalments of £10 for every quarter, the first instalment to be paid on Mar. 31, 1937. In case default is made in payment of any instalment according to this order, excution or successive executions may issue for the whole of the said sum and costs remaining unpaid or for such portion thereof as the court shall order but such sum and costs shall not be payable out of any property of the defendant to the enjoyment of which there is attached any enforceable restriction against anticipation.

The instalment which fell due for payment under this order on Mar. 25, 1937, was not paid on that date, or on any subsequent date, and on Oct. 14, 1937, the creditor caused a bankruptcy notice to be issued, which was served on the debtor on Oct. 27, 1937. The notice required the debtor, within seven days after service of the notice, to pay the sum of £78 18*s.* 6*d.* adjudged to be recovered by the order of Feb. 11, 1937, or to secure or compound for that sum to the satisfaction of the creditor or of the court, or to satisfy the court that she had a counterclaim, set-off or cross-demand against the creditor equalling or exceeding the sum claimed, which the debtor could not set up in the proceedings in which the judgment was obtained. The debtor did not comply with this order before the time limited for payment—namely, Nov. 4, 1937—nor did she dispute the validity of the notice. The creditor, on Dec. 9, 1937, presented a bankruptcy petition against the debtor. The act of bankruptcy alleged was the non-compliance before Nov. 4, 1937, with the bankruptcy notice of Oct. 14, 1937.

The petition was heard by the registrar of the Guildford County Court on Feb. 10, 1938, when he dismissed it, on the ground that the petition was based on a judgment obtained in respect of a contract by a married woman, part of which was in respect of goods supplied to her before Aug. 2, 1935, and that the judgment was indivisible and inseparable. An application by the creditor to amend the bankruptcy notice was refused.

The creditor appeals from this decision on the ground that the registrar was wrong in law in holding that a receiving order could not be made against the debtor in respect of the judgment, since it was obtained in proceedings to recover a number of debts, one only of which had been incurred before the coming into operation of the Law Reform (Married Women and Tortfeasors) Act, 1935, the total amount of the debts incurred after the coming into operation of the said Act being in excess of £50, and contends that the registrar ought, in the circumstances, to have made a receiving order. The creditor asks the court to make such an order. The bankruptcy notice follows the judgment, but, if and so far as it seeks to enforce the payment of the whole of the amount included in the judgment from the debtor, it is in direct conflict with the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 4 (1) (*c*), which provides:

> Nothing in this part of this Act shall . . . (*c*) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act [Aug. 2, 1935] to be enforced in bankruptcy or to be enforced otherwise than against her property.

The question, therefore, is whether the issue of a bankruptcy notice in respect of a judgment, part of which is for a debt incurred by a married woman before Aug. 2, 1935, is an enforcing of that debt in bankruptcy. In considering this question, it must be remembered that it is no longer the law (as was laid down in *Re A Debtor* (*No.* 478 *of* 1908), *Ex p. Debtor* (1)) that a bankruptcy notice issued for a sum larger than that which is actually due is invalid, for it is expressly provided by the second proviso to the Bankruptcy Act, 1914, s. 2, that a bankruptcy notice:

> shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement.

No such notice was given in the present case, and consequently the proviso applies if it can properly be said that the sum specified in the bankruptcy notice exceeds the amount actually due from the debtor. The judgment is for £78 18*s.* 6*d.*, and, having regard to the form of the judgment, it would appear that the whole of this sum is recoverable from the debtor personally, and is therefore due from her. In fact, however, £5 5*s.* or some part of £5 5*s.* could not have been recovered from the debtor personally, but could have been recovered against her separate property only, because that sum represents a debt incurred before Aug. 2, 1935. The questions therefore arise: (i) can the court look behind the judgment and inquire into and ascertain the amount actually due from the debtor under it, and (ii) if it can, and, having done so, ascertains that the amount due exceeds £50, ought the court to make a receiving order? There is no direct authority dealing with the precise point, but in *Re Debtor, Ex p. Petitioning Creditor* (2) the Court of Appeal laid down the principles on which the court ought to act in a case where judgment has been obtained against a debtor for a sum larger than that which was, in the circumstances, properly recoverable. The material facts of that case were as follows. A moneylender recovered judgment against a debtor in respect of a balance due under a transaction within the mischief of the Moneylenders Act, 1900. The debtor had paid certain sums in reduction of the debt, but was served with a bankruptcy notice in respect of £710, the balance at the date of service remaining due under the judgment. The debtor failed to comply with the bankruptcy notice, but did not dispute its validity. On the hearing of the bankruptcy petition founded on non-compliance with the bankruptcy notice, the debtor disputed the debt, claiming relief under the Moneylenders Act, on the ground that the transaction was harsh and unconscionable. The registrar held that the transaction was harsh and unconscionable, and fixed the amount properly due from the debtor to the creditor at a sum in excess of £50. The registrar refused to make a receiving order, and, in adjourning the petition, gave the creditor leave to amend, and re-present it, in order to give the debtor an opportunity of discharging the debt. The creditor appealed to the Court of Appeal. That court agreed that the registrar had power on the petition to re-open the transaction under the Moneylenders Act, but held that the registrar, having found that the amount due to the petitioning creditor from the debtor exceeded £50, was bound to make a receiving order, and accordingly made such an order. SCRUTTON, L.J., pointed out that, although the registrar had power to go behind the judgment, he had no power to alter it, and that, notwithstanding his finding, the judgment still stood in respect of £710, and the bankruptcy court would have had no power to interfere if the creditor had put in an execution for that amount. He also expressed the opinion that, apart from certain decisions in the Court of Appeal, it would seem right for the bankruptcy court to refuse the creditor in such a case the remedy of enforcing the judgment by bankruptcy proceedings. The material passage in his judgment is to be found at p. 69 :

> Apart from the authorities, if an unfair use was being made of a judgment and there was a judgment which could be reduced under the Moneylenders Act, and it was proposed to enforce it by bankruptcy proceedings, I can understand the court of bankruptcy saying, We will not give you this remedy ; take all the other remedies you can get, but we will not give you this remedy.

Apart from authority, this view certainly appeals to us. SCRUTTON, L.J., however, went on to show that this opinion was not in accordance with earlier decisions of the Court of Appeal which were binding on that court, and said, at pp. 69-71 :

> But I find that, at any rate in two cases, the Court of Appeal have used language which shows that they think the registrar can, on these proceedings, find out what the amount of the debt should be. Both of those authorities are judgments of LORD ESHER. In the case of *Re Vitoria, Ex p. Vitoria* (3), at p. 390, LORD ESHER points out very much what I have been saying about the position of a judgment in regard to the registrar's powers. He says : "Suppose that the registrar should come to the conclusion that the judgment was obtained by fraud ; he would then have power to say that he would not make a receiving order. But he would have no power to set aside the judgment, or to stay execution upon it. The authority of a registrar in bankruptcy depends entirely upon the Bankruptcy Act, and he has no power to set aside or to review a judgment. But the court of bankruptcy can refuse to make a receiving order in respect of a judgment which it cannot set aside." In the other case, *Re Fraser, Ex p. Central Bank of London* (4), at pp. 260, 261, LORD ESHER says this : "The mere fact that there is a judgment in law does not

> prevent the registrar from considering whether there was a good petitioning creditor's debt. The bankruptcy court can go behind the judgment and inquire into the liability on which the debt was founded. The bankruptcy court does not set aside the judgment and is not called upon to do so. It goes round the judgment and inquires into the subject-matter on which the judgment is founded. It might perhaps be said that on the Bankruptcy Act, 1883, s. 4 (1) (*g*), the judgment is to govern the matter, but when we come to sect. 7 it shows that even if there is a judgment the court may not be satisfied that the case is one in which it ought to make a receiving order. That was clearly decided in *Re Lennox, Ex p Lennox* (5), where it was held that the court of bankruptcy had power to go behind a judgment and inquire into the consideration for the judgment debt, not only at the instance of the trustee in bankruptcy of the debtor upon the question of the proof of the debt, but also at the instance of the judgment debtor himself upon the hearing of a petition by the judgment creditor for a receiving order, even though the debtor has consented to the judgment; and if on the hearing of the petition facts are alleged by the debtor, of which evidence is rendered, and which, if proved, would show that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the court ought not to make a receiving order without first inquiring into the truth of the debtor's allegations. That rule of conduct is put on the highest ground, that you are not dealing simply between a man and his creditor, but you are interfering with the rights of other creditors. Therefore it was said that the court ought not to exercise its tremendous power unless it was perfectly satisfied there is a good petitioning creditor's debt irrespective of the judgment." I take that to be a decision of the Court of Appeal which binds me, that, although there is one debt under the judgment with which the registrar cannot interfere, he may inquire whether there is another debt, a different debt from the judgment debt, which is a good petitioning creditor's debt, by which I suppose is meant a debt of over £50. The effect of such a finding apparently would be only very limited; it will not interfere with the extent of the other debt under the judgment, or the remedies under the judgment, but it will say that, for the purposes of the bankruptcy, apart from the judgment, there is a debt of over £50 in respect of which a remedy can be given in bankruptcy, though it cannot be given in respect of the amount for which it is being claimed. I confess that that curious limited new debt so brought into existence does seem to me rather an anomaly, but I am bound by the decision of the Court of Appeal, which clearly recognises that possibility, to say that the registrar can inquire into, not the judgment debt, but whether, behind the judgment debt, there is a good debt of more than £50.

It seems to us that in principle the decision to which we have referred applies to and covers the present case, and that there is nothing in the circumstances of the present case to render the principle inapplicable. Part of the judgment in the present case cannot be enforced by bankruptcy proceedings, but, if that part is eliminated, a sum in excess of £50 remains due to the creditor. The making of a receiving order does not entitle the creditor to insist on obtaining in the bankruptcy the full amount due under the judgment, or a dividend in respect of that amount. Indeed, the trustee in bankruptcy, if and when an order is made, would be bound by reason of the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1 (1) (*c*), to refuse to admit to proof such part of the judgment as relates to the debt incurred before Aug. 2, 1935. For these reasons, we are of opinion that the registrar was in error in refusing to make a receiving order on the petition, and consequently his decision must be reversed. In the result, the appeal will be allowed, and a receiving order made against the debtor. The deposit will be paid out to the appellant.

Solicitors: *W. A. G. Davidson & Co.* (for the appellant); *Rising & Ravenscroft*, agents for *Triggs Turner & Co.*, Guildford (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re BLAKE, BERRY *v.* GEEN.

[House of Lords (Lord Maugham, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen, and Lord Macmillan), **March 7, 8, April 12, 1938.]**

Perpetuities—Accumulations—Will—Annuities payable out of residue—Accumulation of surplus income—Residuary legacy after death of last annuitant—Determination of trust for accumulation of surplus—Law of Property Act, 1925 (c. 20), *s.* 164.

The testator devised his residuary estate to his trustees upon trust to pay a number of annuities out of the income thereof, and he directed that any surplus income should be accumulated and invested so long as any of the annuitants were alive. Should there, however, be a deficiency in any one year, it might be made up from the surplus income in any other year. Subject to these provisions, he gave the whole of his property, after the death of the last personal annuitant, to a residuary legatee upon certain trusts. It transpired that the annual income far exceeded the amount required to pay the annuitants. The residuary legatee, a charity, asked that the trust for accumulation should be determined, and that, subject to the proper provision being made for payment of annuities and legacies, the residuary estate should be transferred to the charity :—

Held : (i) as the annuities were charged on the whole residuary estate, any deficiency in the annuities could be made up from the accumulations of income, which had been made in past years, or might be made in future years.

(ii) the accumulations would cease on the expiration of 21 years from the testator's death, and the released income down to the death of the last surviving personal annuitant would pass as on an intestacy to the next of kin and the heir-at-law.

(iii) no order for the transference of the residuary estate or any part thereof to the residuary legatee ought to be made.

Per Lord Maugham, L.C. : persons who take on an intestacy have just as much claim to be protected in an administration by the court as persons who are legatees.

Order of Court of Appeal ([1937] 1 All E.R. 742) *affirmed.*

[**EDITORIAL NOTE.** It is always desirable that the administration of an estate should be ended as soon as possible, but, where all the interests have not finally vested and been determined, this may only be effected either with the consent of all parties interested being *sui juris* or by an order of the court. The court will not, however, make the order unless all parties consent, nor unless the rights of all parties can be fairly determined at the time the order is made. In the present case the accumulations must stop upon the expiration of 21 years from the testator's death, and, if any of the annuitants survived that date, the surplus income would go as on an intestacy, with the result that a new class of beneficiaries would be brought into the matter. The court in such circumstances found itself unable to make any order for transference of any part of the residuary estate to the residuary legatee.

For the Law on the Point, see HALSBURY, 1st Edn., Vol. 22, Perpetuities, pp. 382, 383, paras. 779-782 ; and for Cases, see DIGEST, Vol. 37, pp. 147-149, Nos. 727-752.]

Cases referred to :

(1) *M'Donald* v. *Bryce* (1838), 2 Keen, 276 ; 37 Digest 147, *728* ; 7 L.J.Ch. 178 ; *subsequent proceedings*, 2 Keen, 517.

(2) *Elborne* v. *Goode* (1844), 14 Sim. 165 ; 37 Digest 131, *614* ; 13 L.J.Ch. 394.

(3) *Oddie* v. *Brown* (1859), 4 De G. & J. 179; 37 Digest 92, *285*; 28 L.J.Ch. 512; 33 L.T.O.S. 174.

(4) *Saunders* v. *Vautier* (1841), Cr. & Ph. 240; 44 Digest 444, *2691*; 10 L.J.Ch. 354.

(5) *Harbin* v. *Masterman*, [1896] 1 Ch. 351; 23 Digest 400, *4714*; 65 L.J.Ch. 195; 73 L.T. 591.

(6) *Wharton* v. *Masterman*, [1895] A.C. 186; 37 Digest 146, *721*; 64 L.J.Ch. 369; 72 L.T. 431; *affg.* S.C. *sub nom. Harbin* v. *Masterman*, [1894] 2 Ch. 184.

(7) *Re Deloitte, Griffiths* v. *Deloitte*, [1926] Ch. 56; 37 Digest 149, *752*; 95 L.J.Ch. 154; 135 L.T. 150.

APPEAL from an order of the Court of Appeal (SLESSER and SCOTT, L.JJ., and FARWELL, J.), dated Feb. 5, 1937, and reported in [1937] 1 All E.R. 742, dismissing an appeal from an order of BENNETT, J., dated Feb. 13, 1936, and affirming such order with a small variation in the form thereof. The facts and the arguments are set out in the opinion of LORD MAUGHAM, L.C.

Cyril Radcliffe, K.C., and *Wilfrid Hunt* for the appellant.

A. P. Vanneck for the executor, the respondent Harry Geen.

Gerald R. Upjohn for the testator's widow.

H. B. Vaisey, K.C., and *A. J. Belsham* for the Newton Abbot Congregational Church.

C. L. Fawell for the respondent, Frederick John Cornish, representing the Devon Congregational Union.

C. E. Harman, K.C., and *A. C. Nesbitt* for the heir-at-law and next of kin.

A. Andrewes Uthwatt for the Attorney-General.

LORD MAUGHAM, L.C.: My Lords, the questions raised by this appeal depend upon the true construction of the will of the testator, Charles Davey Blake, who died on Jan. 1, 1925, and whose will dated Sept. 14, 1920, was duly proved on Mar. 18, 1925, by Charles Geen (since deceased) and the respondent Harry Geen, the executors therein named.

By his said will the testator, after appointing executors and trustees and making certain specific devises, gave and devised all the rest of his estate of every sort and description unto his trustees upon trust to pay certain annuities out of the income of his residuary estate to the persons thereinafter named to whom he gave the same for their respective lives and he directed the same to be paid in order of preference and priority by groups as thereinafter mentioned, and there followed a series of annuities divided into six groups, of which some were personal annuities for individuals, and others (being group six) were annuities for institutions or bodies corporate, and he declared that all the annuities in group six should cease on the death of the last personal annuitant and "on the death of the last personal annuitant" he gave four several legacies (aggregating to £6,000) to the several trustees of certain churches to be invested by them, and he declared that all devises and bequests including the annuities were given free of all death duties, which were to be paid by his trustees out of his residuary estate. The will continued as follows :

> And I direct that so long as any of the before-mentioned annuities shall be payable the balance of the income of my residuary estate and the resulting income thereof shall be accumulated by my trustees and invested but that any deficiency in income in one year may be made up from the surplus income of any other year and subject as aforesaid I give the whole of my property after the death of the last personal annuitant under this my will to the Congregational Union of England and Wales to be invested as a capital sum but as regards one half of the net income from such investments upon trust to pay the same to the Devon Congregational Union.

The annuities given by the will originally amounted to £3,453. By the end of 1933, the aggregate of the annuities had been reduced, by deaths, to £2,274, of which more than one-half is payable to the testator's widow, who is more than 80 years of age. The capital of the testator's estate, together with the accumulations of surplus income, amounted, on Dec. 31, 1933, to a sum not much less than £500,000, and there was an annual surplus income exceeding £11,000. It is therefore clear that the net income of the testator's estate is far more than sufficient to provide for the payment of all the annuities and for the payment of the legacies amounting to £6,000 declared by the testator to be payable on the death of the last personal annuitant. It is easy to understand, and also to sympathise, with the desire of the appellant, who represents the Congregational Union of England and Wales, and of the respondent Frederick John Cornish, who represents the Devon Congregational Union, to put an end to the accumulation directed by the will, of course after making ample provision for the annuitants and the legatees. In what follows I shall use the name of the Congregational Union to describe the Congregational Union of England and Wales and to include in the term the equitable rights of the Devon Congregational Union.

The difficulty arises from the circumstance that the accumulation of income is directed to continue until the death of the last surviving personal annuitant. Since there were originally some 40 such annuitants, it is probable that the death of the last of them will not take place, having regard to their ages, till many years after the testator's death. According to the Thelusson Act, now re-enacted in the Law of Property Act, 1925, s. 164, the accumulation of income for a longer period than a term of 21 years from the death of the testator (in the circumstances of this case) is made illegal. The accumulation of income directed by the will must therefore cease on Jan. 1, 1946, but in all probability the gift of the whole of the testator's property " after the death of the last personal annuitant " will not take effect in possession, according to the terms of the will, till a number of years after 1946. There is thus an apparent gap in the declared trusts of the surplus income from 1946 till the death of the last personal annuitant. The Act in effect declares that the income of the property directed to be accumulated during the period after 1946, for so long as the accumulation if valid would have lasted, goes to

> the person or persons who would have been entitled thereto if such accumulation had not been directed.

My Lords, the first question which has to be determined on the con-
A struction of the will is whether the annuities are charged only on the income of the residuary estate, with the result that the capital must be treated as belonging absolutely, at the end of the period, to the Congregational Union. It seems to me that this contention is ill-founded, if only for the reason that the testator has directed " that any deficiency
B in income in one year may be made up from the surplus income of any other year." I can see no good reason for reading these last words as meaning " any other subsequent year." The balance of income of past years has no doubt been accumulated. So far, however, as it exists, it is surplus income of some " other year." Any other construction might
C lead, in the event of a continued deficiency in income, to great hardship in regard to the numerous annuitants of small sums. Moreover the words " subject as aforesaid," which introduce the final gift, tend strongly to enforce the view that the Congregational Union gets nothing until all the annuitants have been paid in full. I think, therefore, that
D this contention fails.

The next point argued is that the words " I give the whole of my property after the death of the last personal annuitant " are wide enough to include the surplus income illegally directed to be accumulated and released, so to speak, by the Act. It is well-settled that the proper
E method of approach to this question is to construe the will as it stands, without regard to the statutory limit of accumulation, and then to consider the effect of the Act upon the dispositions contained in the will. If a specific fund is directed to be accumulated for a period beyond that which is allowed by the Act, the released income (as I shall call the
F income not validly disposed of by the testator) will generally pass under the residuary gift. If the direction refers to the income of residue, the released income, generally speaking, is undisposed of, and will devolve (as regards a will coming into operation before 1926), in the case of personal property, upon the next of kin, and, in the case of real property,
G upon the heir: *M'Donald* v. *Bryce* (1), *Elborne* v. *Goode* (2), *Oddie* v. *Brown* (3). On the other hand, there may no doubt be cases where the final gift of residue is so worded as to include all income not effectually disposed of in the preceding dispositions. In the present case, such a construction seems to me to be impossible, since it is clear that the
H Congregational Union is given nothing until the death of the last personal annuitant. The words " after the death of the last personal annuitant " cannot be disregarded, and it is to be observed that the phrase is in effect a repetition of the previous sentence " and on the death of last personal annuitant," which introduces the gifts of pecuniary legacies to the four named Congregational Churches. It follows that, unless the accumu-

lations can be stopped, the released income down to the death of the last surviving personal annuitant will pass as on an intestacy to the next of kin and the heir-at-law.

My Lords, upon this construction of the will, it is not now in dispute that the rule in *Saunders* v. *Vautier* (4) does not apply, the reason being that that rule has no operation unless all the persons who have any present or contingent interest in the property are *sui juris* and consent. That is not the case here as regards all the persons who have rights as next of kin to a share in the released income. There is, therefore, no legal right in the Congregational Union to stop the accumulations, even if due provision be made for the annuities and the legacies payable on the death of the last personal annuitant. The interests of annuitants as such could no doubt be provided for in the usual way: *Harbin* v. *Masterman* (5), at p. 361. The real difficulty in this case is that the residuary legatees have no right to the released income.

The appellants alternatively contend that the court has a discretion to stop the accumulations and to permit the Congregational Union to have immediate enjoyment of the property, subject to making proper provision for the annuitants. This would have the effect of destroying the interests of the heir-at-law and next of kin in the released income, or, in other words, of accelerating the vesting in possession of the residue at the expense of those persons. There is no authority for the interference of the court in such a manner, and it seems to be clear that it could not be justified in principle. Persons who take on an intestacy have just as much claim to be protected in an administration by the court as persons who are legatees. It may be tested in this way. Suppose the testator had directed that the surplus income of his residuary estate should be accumulated for 21 years from his death, and had disposed of the residue upon, and not earlier than, the death of a number of annuitants. Would it be possible to argue that the court by an exercise of discretion could properly deprive the persons entitled on intestacy to the undisposed-of income ? Yet the present position is precisely the same from the point of view of the court's discretionary powers.

My Lords, it was attempted by the appellants to support their contention by a reference to the decision of this House in *Wharton* v. *Masterman* (6). It is true that an accumulation of residue was directed by the testator in that case for a period beyond that permitted by the Thelusson Act—namely, till the death of the last of several annuitants, some of whom were still alive though the legal period had come to an end. The residuary legatees were charities, and it was held by this House that their interests were vested and indefeasible, and that they were entitled year by year to have the surplus income handed over to them. It is argued that the rights of the next of kin and heir-at-law of the testator to the released income were thus defeated, and your Lordships were invited to follow that decision. There was, however, a vital difference between that case and the present one. The will of Mr. Duncan in the former case contained express clauses preventing the annuitants from having a deficiency of income in any year made good in any other year. If there was a deficiency, the annuities had to abate. It was thus clear that, when the period of distribution of the estate arrived, according to the terms of the will the residuary legatees were entitled to the whole of the capital of the residue, undiminished by any claims of the annuitants. In those circumstances, there was, it is true, a direction to accumulate, but not an effective one, since the residuary legatees were absolutely entitled, under the rule in *Saunders* v. *Vautier* (4), to the whole residuary estate, subject only to the rights of the annuitants to be paid out of the yearly income. This House accordingly treated the case as one where the residuary estate was given absolutely to a person *sui juris* charged only with annuities payable out of income. Lord Herschell, L.C. pointed out, in *Wharton* v. *Masterman* (6), at p. 193, that in that case the Thelusson Act did not apply, the reason being that the rule in *Saunders* v. *Vautier* (4) was applicable. See also the opinion of Lord Macnaghten, at p. 194. Lord Davey, at p. 200, pointed out that there was:

> no effective direction for accumulation of any part of the surplus income . . . and, therefore, the Thelusson Act has no application to it. . . .

In my opinion, that is not the case here, where the rule in *Saunders* v. *Vautier* (4) is not applicable, but the Act as to accumulations is.

On these grounds, I come to the conclusion that the judgments of Bennett, J., and of the Court of Appeal were right. I also agree with the reasons given, except that I do not think that it is necessary to base the decision on the fact that the residuary legatees are charities, or to express any opinion as to the decision in *Re Deloitte, Griffiths* v. *Deloitte* (7). That authority, which turned on the refusal of the court to presume a woman, aged 65, to be past childbearing for the purposes of the case, might require reconsideration in this House at some future time, and I think it better to leave open the questions which it involves. I am satisfied to rest the present matter on principle, and to say, as the Court of Appeal held, that, where there is a direction to accumulate income, effective according to the terms of the will, but in part illegal under the statute, the court ought not in the exercise of its discretion to make an order the effect of which will be, or may be, to destroy or to prejudice the interests of other persons in the released income without the consent of such persons.

My Lords, I think that the appeal should be dismissed, but that, in the circumstances of the case, the costs of all parties as between solicitor and client should be directed to be paid out of the estate.

My Lords, I am authorised to say that my noble and learned friends Lord Atkin and Lord Russell of Killowen concur in the opinion which I have just delivered.

Lord Thankerton: My Lords, I desire also to express my agreement with the opinion which has just been delivered.

Lord Macmillan: My Lords, I also concur.

Appeal dismissed.

Solicitors: *Shepheards, Walters & Bingley* (for the appellant); *Church, Rendell, Bird & Co.*, agents for *Woollcombe, Watts & Scrivener*, Newton Abbot (for the respondent, the testator's widow, and the Newton Abbot Congregational Church); *White & Leonard & Nicholls & Co.*, agents for *W. Rackwood Cocks*, Exeter (for the Devon Congregational Union); *H. W. Guthrie & Co.* (for the heir-at-law and next of kin); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

LEWIS *v.* CATTLE.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Macnaghten, JJ.), **April 6, 7, 1938.**]

Criminal Law—Official secrets—Suspected unlawful communication of information by a police officer—Information published in newspaper paragraph—Journalist's refusal to reveal source of information—Whether a police officer is a "person holding office under His Majesty"—Official Secrets Act, 1911 (*c.* 28), *s.* 2 (1) (*a*)—*Official Secrets Act,* 1920 (*c.* 75), *s.* 6.

A document containing certain information was circulated by one police force to certain other police forces, and no instructions were given that the information could be communicated to the press. Three days later, a paragraph embodying the information in the said document appeared in a newspaper. The appellant, a journalist, refused to disclose the source from which he had obtained the material for the said paragraph, of which he was the author, and he was charged with having unlawfully failed to give on demand to the respondent, a superintendent of police appointed by a chief officer of police for the purpose, information in his power relating to a suspected offence under the Official Secrets Act, 1911, s. 2, contrary to the Official Secrets Act, 1920, s. 6. The justices convicted the appellant and fined him £5. Thereupon this appeal was brought, and the appellant's main contention was that a police officer is not a "person holding office under His Majesty," within the meaning of sect. 2 (1) of the Act of 1911:—

Held: as every police officer in England and Wales holds the office of constable, and is required to take an oath of office and to carry out the duty of preserving the King's Peace, it follows that a police officer is a "person holding office under His Majesty" within the meaning of sect. 2 (1) of the Act of 1911.

[EDITORIAL NOTE. This case turns upon the construction of the words "any person holding office under His Majesty," and the question is whether these include a police constable. It was contended that these officers were the employees of the local authorities who appointed them, but it has been held that they hold the office of constable, which is a special office, with special duties and rights which have been conferred upon it by common law and by statute. The primary duty of that office is to preserve the King's Peace, and for this reason a police constable comes within the statutory words above referred to.

As to Communication of Information, see HALSBURY, Hailsham Edn., Vol. 9, p. 325, para. 505; and for Cases, see DIGEST, Vol. 15, pp. 659, 660, Nos. 7104-7107.]

Appeal by way of case stated against a decision of the justices for the county borough of Stockport, sitting at Stockport. The facts and the relevant sections of the Official Secrets Acts are set out in the judgment of Lord Hewart, L.C.J.

Sir William Jowitt, K.C., and *J. C. Jolly* for the appellant.

A *Valentine Holmes* and *Fenton Atkinson* for the respondent.

Lord Hewart, L.C.J.: This is a case stated by justices for the county borough of Stockport. The case arose in the following way. An information was preferred by the respondent under the Official
B Secrets Act, 1920, s. 6, against the appellant for that he unlawfully failed to give on demand to the respondent, a superintendent of police appointed by a chief officer of police for the purpose, information in his power relating to a suspected offence under the Official Secrets Act, 1911, s. 2. That information was heard on Aug. 20, 1937, and the justices, sitting as
C a court of summary jurisdiction, convicted the appellant, and imposed a fine of £5. The appellant appeals from that decision, and the question for this court is whether the justices came to a correct determination in point of law.

The facts of the case may be very briefly summarised. The appellant
D is, and was, a member of the staff of a newspaper called the Daily Dispatch. The respondent is, and was, a superintendent of police for the borough of Southport in Lancashire. On June 11, 1937, a warrant was issued by the police force of the borough of Southport for the arrest of a man named Tansley Munnings on a charge of fraudulent conversion of
E the sum of £5. On June 14, 1937, information was circulated in writing by the police force of Southport to certain other police forces. In the issue of the Daily Dispatch dated June 17, 1937, there appeared a paragraph under the heading "Frauds on workless alleged." Admittedly the appellant was the author of that paragraph. The case goes on to
F find that the circulation of the document was by the ordinary course of post. It was intended by the Southport police force to be for the information of the police alone, but no intimation was sent with the document that that was the intention. At Southport, a document such as this would be dealt with under close supervision, and would be dealt with
G as confidential. The justices state:

> There being no evidence before us as to the practice in relation to other towns to which the said document was sent, nor was there any evidence as to the manner in which the said document was dealt with in any place other than Southport. On occasions the police give information to the press in order to obtain the assistance of the press, and circulars respecting wanted men and containing descriptions of them are quite frequently placed on notice boards in police offices. No instruc-
> H tions were given in this case that the information could be given to the press. The document referred to was circulated to police forces only for the information of the police. Afterwards, on July 29, 1937, the respondent visited the appellant in Stockport and informed him that he, the respondent, had received the consent of the Attorney-General to make inquiries under the Official Secrets Act, 1920, s. 6, and he required from the appellant the name of the person from whom the appellant had received the information published in the paragraph. The appellant refused to give any information as to the source from which he had obtained the material for that paragraph.

The case further finds that the respondent was appointed by the chief constable of Southport to make that inquiry. Then follow, in the case, extracts from the relevant sections of the statutes, and then come the contentions on either side. The material contention on the part of the appellant was that a police officer is not a person holding office under His Majesty. On the part of the respondent it was contended that a police officer is a person holding office under His Majesty. Those being the contentions on the one side and on the other, the justices found, apparently by a slip of the pen, that a police officer is in the service of His Majesty, which is a different expression. They found also that the document referred to was a confidential document, that there were reasonable grounds for suspecting that the document was confidential, and that the appellant unlawfully failed to give on demand to the respondent information in his power relating to a suspected offence under the Official Secrets Act, 1911, s. 2, contrary to the Official Secrets Act, 1920, s. 6, and accordingly they fined the appellant.

It is not necessary, I think, to read again the passages which have been read from the Official Secrets Acts. The important passage, in my opinion, is to be found in sect. 2 (1) (*a*) of the Act of 1911, as follows (leaving out the immaterial words):

> If any person having in his possession or control any . . . information which . . . has been . . . obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under His Majesty. . . . or as a person who is or has been employed under a person who holds or has held such an office . . . (*a*) communicates the . . . information to any person, other than a person to whom he is authorised to communicate it . . . that person shall be guilty of a misdemeanour.

It is further provided by the Official Secrets Act, 1920, s. 6:

> It shall be the duty of every person to give on demand to a chief officer of police, or to a superintendent or other officer of police not below the rank of inspector appointed by a chief officer for the purpose, or to any member of His Majesty's Forces engaged on guard, sentry, patrol, or other similar duty, any information in his power relating to an offence or suspected offence under the principal Act or this Act . . . and, if any person fails to give any such information . . . he shall be guilty of a misdemeanour.

In my opinion, it is true to say that every police officer in England and Wales, whether he be a member of the metropolitan police force or a member of the police force of a county, city or borough, holds the office of constable, and within his constablewick has all the duties and rights conferred by common law or statute upon the holders of that office. He is required to take an oath of office, and his primary duty is to preserve the King's Peace. It follows that a police officer is a person who holds office under His Majesty within the meaning of the Official Secrets Acts.

It may be well to observe that the justices, in submitting this case for the opinion of this court, after stating, and stating correctly, that the question at issue between the parties was whether or not a police officer is a person holding office under His Majesty, state that they find that a police officer is in the service of His Majesty, being, apparently, under the impression that a person who serves His Majesty must necessarily hold office under His Majesty. That, however, is not the case. There are many offices which are held under His Majesty the holders whereof are not in any proper sense of the words in the service of His Majesty. So also there are many persons in the service of His Majesty who do not in any proper sense of the word hold office under His Majesty. In my opinion, this case is really too plain for argument, and I think that the appeal must be dismissed.

Humphreys, J.: I agree.

Macnaghten, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Cobbett, Wheeler & Cobbett*, Manchester (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

PRATT *v.* A.A. SITES, LTD.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Macnaghten, JJ.), **April 7, 1938.**]

Magistrates—Summary jurisdiction—Preliminary objection to jurisdiction upheld by justices—Whether appeal lies by way of case stated—Summary Jurisdiction Act, 1857 (*c.* 43), *ss.* 2-5—*Summary Jurisdiction Act,* 1879 (*c.* 49), *s.* 33 (1).

In all cases where justices decide, rightly or wrongly, that they have no jurisdiction to hear a case brought before them, no appeal lies by way of case stated. If the justices have reached a wrong decision, the proper remedy is to apply for an order in the nature of a *mandamus.*

[**EDITORIAL NOTE.** Where justices decide that they have no jurisdiction, and do not proceed to hear the summons or complaint, the proper remedy, if it is desired to test the question of jurisdiction, is to apply to the High Court for a rule calling upon the justices to hear and determine the matter. It has been said, however, in *Muir* v. *Hore* (1877), 41 J.P. 471, that, where the justices proceed to hear the whole of the evidence upon the summons or complaint, and then decide that they have no jurisdiction, an appeal may be had by way of case stated.

As to Appeal by Way of Case Stated, see HALSBURY, Hailsham Edn., Vol. 21, pp. 722-724, paras. 1251-1254; and for Cases, see DIGEST, Vol. 33, p. 408, Nos. 1180, 1181.]

Case referred to:

(1) *Wakefield Local Board of Health* v. *West Riding & Grimsby Ry. Co.* (1866), 6 B. & S. 802: 33 Digest 408, *1180*; 30 J.P. 628; 15 L.T. 179.

Appeal by way of case stated from a decision of the justices in and for the petty sessional division of Willesden, in the county of Middlesex. The facts are fully set out in the judgments.

R. T. Monier-Williams for the appellant.

A. M. Lyons, K.C., and *B. A. C. Duncan* for the respondents.

Lord Hewart, L.C.J.: This is in form, but I think only in form, a case stated by justices for the petty sessional division of Willesden. It appears from the document before us that at a court of summary jurisdiction a complaint was preferred by the town clerk on behalf of the corporation of Willesden against the respondents for that on a certain day in Mar., 1937, a notice under, it is said, the provisions of the Willesden Town Planning Scheme, 1933, s. 40, to remove a certain advertisement displayed and affixed to the front wall of a certain road in Willesden was duly served on certain persons, being the persons by whose action or omission serious injury was thereby caused to the amenity of the adjoining Character Zone 1, as defined in the said scheme:

> and the said A. A. Sites, Ltd., had made default in complying with the requisitions of the said notice.

Similar notices were served upon other named respondents. The case concludes with this:

> Which said complaints were heard by us on Aug. 26, 1937, when we, the said court of summary jurisdiction, dismissed the said complaints.

So much for the form of this case. The justices go on to say that the appellant, being dissatisfied, applied for a case, and this case is stated. When one looks further into the case, a different complexion appears. The justices, having to some extent summarised the matter, say, in para. 7: "We were of opinion that the first submission of the respondents was right." It may be well to refer again to the terms of that submission. The submission was:

> that the procedure was not applicable and the machinery employed by the local authority was wrong and that the respondents were not amenable to this jurisdiction.

The justices are therefore saying that they were of opinion that the respondents were right in saying that they were not amenable to this jurisdiction. Then the case continues in these terms:

> The procedure before a court of summary jurisdiction was clearly set out in the Town and Country Planning Act, 1932, s. 47 (2), (3), and we had no jurisdiction to hear the complaints brought before us.

That statement purports to be a statement of the opinion of the justices. They add:

> We therefore dismissed the summonses without costs, and without hearing the submissions of the appellant in reply to the second and third submissions of the respondents.

Whatever else may be doubtful in this case—and, in my opinion, much is doubtful—it seems to me to be perfectly clear that the justices formed and expressed the view that they had no jurisdiction to hear the complaints brought before them. That being so, I think that the position is that which was disclosed in *Wakefield Local Board of Health* v. *West Riding & Grimsby Ry. Co.* (1), where BLACKBURN, J., addressing the counsel who then appeared for the appellants, said, at p. 629:

> Your proper course seems rather to have been to apply for a rule by way of A *mandamus*, calling on the justices to hear the case, for they have not heard it yet. I think there has never been an instance where the justices declined to hear the case for want of jurisdiction, and then stated a case for the opinion of the superior court.

After further observations by counsel, BLACKBURN, J., continued as follows, at p. 629:

> B I think nothing can be clearer than that the justices made a mistake in granting the case, as the Summary Jurisdiction Act, 1857, does not apply. The justices, when the question of jurisdiction was raised before them, decided, rightly or wrongly, that they had no jurisdiction. If they were right, then the parties can only go and renew the information before other justices, who are not interested. If they were wrong, then the remedy is to apply for a rule under Jervis's Act, commanding them to hear and determine the case.

C In the present case, the justices have expressed themselves on this point, at any rate, with perfect freedom from ambiguity, because they say:

> We were of opinion that we had no jurisdiction to hear the complaints brought before us. We therefore dismissed the summonses without costs.

D

HUMPHREYS, J.: I am of the same opinion. By the original statute which made it possible for a case to be stated—the Summary Jurisdiction Act, 1857—it was provided that, after the hearing and determination by justices of the peace of any information or complaint, the justices E might state a case for the opinion of the court. That power of stating a case was enlarged to some extent by the Summary Jurisdiction Act, 1879, s. 33, which provides as follows:

> (1) Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that F it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case . . .

In my view, the later statute does not get rid of the rule which existed long before that statute was passed, and which is stated in the case to which LORD HEWART, L.C.J., has referred. This court will not hear a case G stated except for the purpose of disposing of the matters raised by the case. Where justices have not heard and determined a question before them at all, but have merely said, "We decline jurisdiction in this matter; we think we have no power to adjudicate in this matter," the court leaves the party aggrieved to his remedy by applying for a rule H calling upon the justices to hear and determine the matter.

For that reason, putting the matter upon that simple ground, I agree that in this case the court has no right to consider this so-called case stated, inasmuch as the justices have themselves in terms informed the court that what they did was to hold that "we had no jurisdiction to hear the complaints brought before us." The remedy to get rid of that decision of the justices, if it was in fact wrong, is not, I think, by case stated.

Macnaghten, J.: I am of the same opinion. Before the justices, the present respondents took what is called the preliminary objection that the magistrates had no jurisdiction. I have listened most carefully to Mr. Lyons' argument before this court, and I have been wholly unable to understand on what ground it could be said that they had no jurisdiction. It seems to me that the plain words of the Act showed that they had, but, since the justices declined jurisdiction, I agree that the remedy by case stated is not available to them.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *E. A. Pratt*, Town Clerk, Willesden (for the appellant); *Frederick Wills* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

WESTMINSTER BANK, LTD. *v.* RESIDENTIAL PROPERTIES IMPROVEMENT CO., LTD.

[Chancery Division (Simonds, J.), **March 22, 23, April 7, 1938.**]

Practice—Foreclosure proceedings—Parties—Property subject to debentures issued in a series—All debenture holders to be made defendants—R.S.C., Ord. 16.

The plaintiff bank, first mortgagees of certain leasehold premises, the property of the defendant company, sought to enforce their security by foreclosure. The defendant company had issued on Jan. 25, 1935, a series of debentures of which £50,290 were outstanding at the date of the summons, and were vested in a considerable number of debenture holders. So far as these debenture holders were concerned, the plaintiff bank joined as defendant one Robinson, who was described as a representative of the class of debenture holders:—

Held: though the task might be an onerous one, it was necessary to bring before the court all persons interested in the equity of redemption.

[**EDITORIAL NOTE.** It was sought here, where a large number of debenture holders were in the position of subsequent incumbrancers, to join only one of such debenture holders as a representative party. It has been decided that this is against the practice of the courts. This decision places an onerous task upon a mortgagee seeking to foreclose, but it is pointed out that foreclosure is in the nature of the ultimate remedy of a mortgagee, and, if he does not choose to be satisfied with his remedies by sale, appointment of a receiver, or going into possession, he must face the difficulties that the joinder of so many parties entails.

As to Parties to Foreclosure Proceedings, see HALSBURY, Hailsham Edn., Vol. 23, pp. 465-469, paras. 684-691; and for Cases, see DIGEST, Vol. 35, pp. 558-566, Nos. 2894-2983.]

Cases referred to:

(1) *Griffith* v. *Pound* (1890), 45 Ch.D. 553; 35 Digest 425, *1629*; 59 L.J.Ch. 522.

(2) *Wallace* v. *Evershed*, [1899] 1 Ch. 891; 10 Digest 755, *4720*; 68 L.J.Ch. 415; 80 L.T. 523.

Originating Summons by which the plaintiffs asked that an account be taken of what was due to the plaintiffs under and by virtue of a mortgage dated May 27, 1927, whereby certain property stood charged to the plaintiffs with payment of £15,000 and interest, and also that the mortgage be enforced by foreclosure and sale.

The facts and the argument are fully referred to in the judgment.

Roger Turnbull for the plaintiffs.

Simonds, J.: The plaintiffs, the Westminster Bank, Ltd., are first mortgagees of certain leasehold premises, the property of the defendants, Residential Properties Improvement Co., Ltd. On Dec. 6, 1937, they commenced these proceedings by originating summons to enforce their security, joining as defendants with the mortgagor company one William Charles Beasley Robinson, whom they purported to sue "on behalf of himself and all other holders of the debentures created by the first defendants on Jan. 25, 1935," and the Royal Bank of Scotland. It appears that on Jan. 25, 1935, the company had created a series of debentures amounting to £71,250, and had issued debentures of that series, of which, at the commencement of proceedings, £50,290 were outstanding, and had further, on Nov. 26, 1935, created and issued to the defendant the Royal Bank of Scotland a debenture to secure sums not exceeding £14,000. There is owing to the plaintiffs as first mortgagees the principal sum of £15,000, together with some interest in arrear and mortgagees' costs.

The matter first came before me in chambers, the plaintiffs having brought in minutes of the proposed order for which they asked, and it appeared that they asked for a foreclosure order in the common form—that is, an account of what was due to the plaintiffs under their charge—and for their costs of action, followed by an order that, upon the defendants or any of them paying to the plaintiffs what should be certified to be due to them as therein mentioned, the plaintiffs should discharge the said charge, or transfer the same as should be directed, but, in default of such payments, the defendants should thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity and redemption of, in and to the said property, and the proposed order contained certain other consequential directions which I need not state.

It was clear, then, that the plaintiffs sought to foreclose all the debenture holders, of whom there were, I was told, a considerable number, without adding them as parties, and it was claimed that it was legitimate to do so, upon the footing that the defendant Robinson was sued as a representative of the class. The matter appeared to me to be one of considerable importance, and I accordingly adjourned it into court for further argument.

Upon the matter coming before me in court, Mr. Turnbull, to whom I am much indebted for his able argument, urged on behalf of the plaintiffs that he was entitled to the proposed order, and that *Griffith* v. *Pound* (1) could no longer be regarded as good law. In that case, in which mortgagees were seeking to foreclose their security, and two only out of a large number of debenture holders, who were subsequent incumbrancers, had been added as defendants to represent the other debenture holders, Stirling, J., declined to make an order for foreclosure, holding that such an order could not be made in an action so constituted, but that all A persons interested in the equity of redemption must, if they were to be bound by the order, be added as parties to the action.

In my judgment, the decision of Stirling, J., governs this case. In that case, as in this, the plaintiffs sought to rely on R.S.C., Ord. 16, r. 8, which has not been altered. That rule was considered by Stirling, J., B in conjunction with R.S.C., Ord. 55, rr. 5A, 5B, which also have remained unaltered so far as they are material to the present case. It appears to me that his judgment is conclusive as an authority upon the point before me. Nor, as I think, is there any valid reason for questioning it upon principle, or upon some supposed change in the practice of C the court.

The rights of all persons interested in the equity of redemption to redeem the mortgaged property has always been jealously guarded by the court, and it would not be in accordance with principle by means of a representation action to foreclose subsequent incumbrancers in their D absence and, it might well be, without their knowledge. Nor do I find any justification for the suggestion that the practice of the court has changed. No case has been cited to me in which the authority of *Griffith* v. *Pound* (1) has been questioned. On the other hand, the practice there laid down was followed in *Wallace* v. *Evershed* (2), where E Cozens-Hardy, J., held that all the debenture holders were rightly added as defendants to an action in which a first mortgagee was claiming foreclosure.

I was referred to R.S.C., Ord. 16, r. 32 (*b*), as supporting the view that I might here make a representation order, but, if r. 9 does not assist the F plaintiffs, I do not see how r. 32 (*b*) can. I doubt whether the language of the rule is apt to cover such a case, but in any event I should decline, in the exercise of my discretion, to make an order under it.

It was urged upon me that the result is to deprive a mortgagee of the property of a company, which has issued debentures to a large number G of persons, of a substantial part of a mortgagee's usual rights, for, if a mortgagee cannot obtain an order for foreclosure unless he has made all subsequent incumbrancers parties to the action, so also he cannot obtain an order for sale without making them parties. The Law of Property Act, 1925, s. 91, enables an order for sale to be made in a variety of H circumstances, including the case of a mortgagee, or any person interested in the mortgage money or in the right of redemption, not appearing, but does not appear to cover the case where subsequent incumbrancers have not been made parties.

Again, special provision has been made by R.S.C., Ord. 51, r. 1B, for sales in debenture holders' actions, whether before or after judgment, before all persons interested are ascertained, whether served or not, and it would seem that this rule has been widely interpreted so as to enable actions to be commenced, judgments made, and orders for sale obtained, in the presence of representatives only of a number of debenture holders. That no departure from the general principle is intended, however, seems clear from the directions given on May 12, 1909, by the Chancery judges (YEARLY SUPREME COURT PRACTICE, 1938, p. 245), which were as follows:

> In a debenture holders' action where the usual judgment has been made, prior and subsequent incumbrancers ought not to be served with notice of the judgment under R.S.C., Ord. 16, r. 40; subsequent incumbrancers should be added as parties under R.S.C., Ord. 16, r. 11; and where a sale is directed with the consent of prior incumbrancers, (as in the form used in the case of a creditor's action for sale of real estate) informal notice with a view to obtaining such consent may be given.

No provision has been made by statute or by rule for the case of an action by a mortgagee where there are numerous subsequent incumbrancers. I agree, then, that the result may be at least highly inconvenient to a mortgagee of the property of a company, but it is an inconvenience which is not to be escaped. It was after all only at a recent date that a rule was made which obviated the necessity of making not only trustee mortgagors, but also their beneficiaries, parties to a foreclosure suit. I see nothing anomalous in a situation which places mortgagees seeking foreclosure in a position of some embarrassment. If they are not content to exercise their right at law to go into possession or their statutory right of sale out of court, but seek the aid of the court to enforce their rights, they must bring before the court all persons who are interested in the equity of redemption, except that, where they have joined the trustees, executors or administrators, they are now (see R.S.C., Ord. 16, r. 8) absolved from the necessity of joining the persons beneficially interested in the trust or estate. The task may be an onerous one, but it is by no means impossible of performance in such a case as this.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the plaintiffs).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re CLARK, SON & MORLAND, LTD.'S, TRADE MARK.

[HOUSE OF LORDS (Lord Maugham, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Macmillan), **February 25, 28, March 1, 3, 4, 7, April 12, 1938.**]

Trade Marks—Rectification of register—Geographical word—"Adapted to distinguish"—"Glastonburys"—Trade Marks Acts, 1905 *to* 1919, *ss.* 3, 9 (4), (5), 11, 19, 44.

(i) The respondents, who traded in Glastonbury in articles made of sheepskin, registered the word "Glastonburys" as a trade mark. The appellants, who dealt in similar goods in the same town, applied to rectify the register of trade marks by expunging this mark, on the grounds that it was a geographical mark and not adapted to distinguish the goods of the respondents, and was calculated to lead to deception. At the trial, it was held that the addition of the letter "s" to the word "Glastonbury" did not alter its geographical character, and that the evidence fell very far short of what was required to show that the mark was adapted to distinguish the goods of the respondents, and that the register should be rectified by expunging the mark. On appeal, the Court of Appeal held that the word "Glastonburys" had become A distinctive of the goods of the respondents, and was rightly registered as a trade mark. Thereupon this appeal was brought :—

HELD : (i) The evidence adduced was insufficient to show that the mark was adapted to distinguish the goods of the respondents, and the mark ought not, therefore, to be allowed to remain on the register.

(ii) Where a large number of similar answers to a circular has been B received, in addition to filing an affidavit exhibiting a fair sample of the replies, an affidavit should be filed merely stating the number of other answers and that such replies are open to inspection by the other side's advisers.

Order of Court of Appeal ([1937] 2 All E.R. 594) *reversed*, and *order of* CLAUSON, J. ([1936] 2 All E.R. 1125) *restored.*

[**EDITORIAL NOTE.** The evidence in this case did not show that the mark C had become distinctive among the general public. The evidence of some trade witnesses went to show that, in response to orders for "Glastonburys" or "Glastonbury slippers," it was their practice to supply the respondents' goods. This evidence is not sufficient to prove distinctiveness, which is dependent upon the area within which, and the period during which, such distinctiveness can in fact be predicated of the mark in question, and it fails in both these respects. D

AS TO GEOGRAPHICAL NAMES AS TRADE MARKS, see HALSBURY, 1st Edn., Vol. 27, Trade Marks, p. 691, para. 1257 ; and FOR CASES, see DIGEST, Vol. 43, pp. 146, 147, Nos. 72-78.]

Cases referred to :

(1) *Trade Marks Registrar* v. *Du Cros (W. & G.), Ltd.*, [1913] A.C. 624 ; 43 Digest 155, *138* ; 83 L.J.Ch. 1 ; 109 L.T. 687 ; 30 R.P.C. 660. E

(2) *Re Liverpool Electric Cable Co., Ltd.'s, Applications* (1928), 46 R.P.C. 99 ; Digest Supp.

(3) *Re Lea (R. J.), Ltd.'s, Application*, [1913] 1 Ch. 446 ; 43 Digest 150, *99* ; 82 L.J.Ch. 241 ; 108 L.T. 355 ; 30 R.P.C. 216.

(4) *Re Société des Usines Chimiques Rhône-Poulenc's Application*, [1937] 4 All E.R. 23 ; Digest Supp. ; 106 L.J.Ch. 352 ; 157 L.T. 225 ; *affg.* S.C., [1937] F 1 All E.R. 145.

APPEAL from an order of the Court of Appeal dated Jan. 13, 1937, and reported in [1937] 2 All E.R. 594, reversing a decision of CLAUSON, J., given on July 14, 1936, and reported in [1936] 2 All E.R. 1125, whereby G it was ordered that the registered trade mark "Glastonburys" be expunged from the register of trade marks. The facts and the arguments are set out in the opinions.

K. E. Shelley, K.C., and *Guy Aldous* for the appellants.

Trevor Watson, K.C., *Robert Burrell, K.C.*, and *G. H. Lloyd-Jacob* H for the respondents.

LORD MAUGHAM, L.C. : My Lords, this appeal raises a question in relation to a registered trade mark, "Glastonburys," which had been registered by the respondents in Class 38 under No. 546,401 in respect of "slippers, slipper-shoes and motor overshoes." The trial judge, then

CLAUSON, J., ordered the trade mark to be expunged from the register. The Court of Appeal, taking another view of the facts, overruled that decision. Hence the present appeal.

I have had the advantage of reading the opinion of my noble and learned friend LORD RUSSELL OF KILLOWEN, who has sufficiently stated A the facts, which it is unnecessary for me to repeat. The trade mark was registered under the Trade Marks Acts, 1905-1919, s. 9, on an application by the respondents dated Nov. 23, 1933. The respondents had in fact begun to use the word "Glastonburys" as a trade mark applied to their slippers in 1931. It is agreed that Glastonbury is a geographical B name, and that the addition of the letter "s" at the end of it makes no difference to the questions which your Lordships have to determine. It is a word which could not be registered as a trade mark under any of the first four subsections of sect. 9, and, in the circumstances of the case, it could only be registered at all under subsection (5) upon evidence C that it was distinctive, a word which in this connection is defined to mean:

> adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

D The subsection further provides that:

> in determining whether a trade mark is so adapted the tribunal may, in the case of a trade mark in actual use [which was here the case], take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered.

My Lords, I think it desirable to emphasise the fact that we are not E here concerned with the registration of a geographical name selected by the proprietor of the goods in such circumstances that it is in effect a fancy name. For instance, as was suggested by counsel for the respondents in his able argument, such a trade mark as the words "North Pole" in connection with bananas would be the use of a geographical F name dislocated, or disconnected, from the origin of the goods. A number of other illustrations, perhaps not happier than that one, can plainly be given. We are here dealing with the name of an ancient and historic town in the West of England, remarkable, it may be added, for some beautiful ancient buildings, which is, on the one hand, the town G in which the respondents actually manufacture the slippers and slipper-shoes which are sold under the mark, and, on the other, the town in which the appellants had actually carried on business in the sale of slippers during the years 1867-1882 and also from 1928 until the present day. In a case where the geographical name put forward for registration H is the name of the actual town or place where the goods are made to the knowledge of the trade and the public, special considerations apply to the questions which fall to be determined under sect. 9 (5) of the Act, since it is at least probable that members of the trade and the public will begin by thinking that the mere geographical name is being used to indicate the place of manufacture. It should be noted also that the registration of this mark gave to the respondents the monopoly conferred by the Act (subject, of course, to sect. 44) in relation to all sorts and descriptions of slippers, whether or not made from sheepskins, and whether or not made at Glastonbury. At the date of registration, the respondents and the appellants had been engaged in the manufacture of sheepskin slippers at Glastonbury tanned with the wool left on the skins, and it was proved that Glastonbury enjoys a certain reputation in connection with sheepskins tanned with the wool on, just as numerous towns in England enjoy a reputation in connection with the making of other goods, such as steel, blankets, straw hats, carpets, boots, buns, and scores of other articles. It is clear that the name Glastonbury used in connection with slippers might indicate, first, that they were made at Glastonbury, or, secondly, that they were made (there or elsewhere) out of skins tanned in a special manner commonly used at Glastonbury, or thirdly, that they were slippers made, or marketed, irrespective of place of manufacture and of materials, by a particular manufacturer. Moreover, the word in some minds might indicate more than one of these facts, or might leave the purchaser guessing which of the three was indicated. In such a case, as it seems to me, the evidence that the third only of the above meanings would in general be attached to the word by the trade and the public ought to be particularly cogent and convincing.

My Lords, it is not in dispute that the appellants, in the circumstances of this case, were called upon to prove by evidence that the word "Glastonbury" or "Glastonburys" alone had become, at the date of registration, adapted to distinguish their goods from those of other persons, and it is further admitted that, even if that question were answered in the affirmative, the tribunal was not bound to allow registration. One of the questions to be determined on this second branch of the case is whether the registration of the trade mark would be likely to cause substantial difficulty or confusion, in view of the rights of other traders to use the name of the place where they do, or may in the future, manufacture similar goods. As I read the judgment of the trial judge, he decided both questions in favour of the appellants. Upon the evidence, he came to the conclusion that it fell far short of what was required to show that the word in fact was adapted to distinguish the goods from those of other persons, and he also held that the registration of the trade mark would cause substantial difficulty or confusion, and, as I understand the judgment, that the protection afforded to other traders under sect. 44 of the Act would not sufficiently protect other traders, or obviate the confusion that might arise.

My Lords, I have considered with the greatest respect the view of the facts taken in the Court of Appeal in overruling, on the first point, the judgment of the trial judge. I feel bound to prefer his view. I should observe that there appears to be no case in which the use of such a geographical name as we are dealing with, for so short a time prior to the registration of the mark, has been held sufficient to establish that the mark is adapted to distinguish. It is, I think, very difficult in such a case to establish that the place where the goods are manufactured has come to indicate, not a geographical fact, but the goods of the manufacturer. Moreover, I am of opinion that a great deal, if not the bulk, of the evidence relied on by the respondents was evidence of little weight. If a manufacturer in a particular town chooses for some years to use the name of the town as a trade mark in respect of his goods, and then (whilst still manufacturing there) proceeds to ask all his trade customers what the name of the town indicates to them, it is, I think, inevitable that many of them will reply that the name indicates to them the manufacture of the person from whom they have been in the habit of procuring the goods. The association of the goods with the place is not, in my opinion, thereby negatived. Accordingly, for my part, I attach small weight to the affidavits of the respondents' customers—all of them, or nearly all of them, framed in the same words—stating that the name of "Glastonburys," when used in connection with slipper-shoes and overshoes, indicates the respondents' goods to the exclusion of those of all other manufacturers. I should add that it is plain that such a customer of the appellants can give evidence only as to what the name means to him, and that he is not entitled to give evidence as to what the name would mean to anyone else in the trade or to the public. Evidence as to the meaning which members of the public, actual or probable buyers of sheepskin slippers, would attach to the word is exceedingly scanty. In the view I take of the evidence given by customers of the respondents, the conclusion is almost inevitable that the opinion of the trial judge on the question whether the evidence was sufficient to prove that the mark was a mark adapted to distinguish the goods of the respondents from those of other persons was correct.

My Lords, on the second question—as to whether, assuming that the mark had been proved among some class of people to be in fact distinctive of the goods of the respondents, it was proper to allow the mark to be registered—I have little to add to the views expressed in the opinion of my noble and learned friend Lord Russell of Killowen. The decisions of this House in *Trade Marks Registrar* v. *Du Cros* (*W. & G.*), *Ltd.* (1) and of the Court of Appeal in *Re Liverpool Electric Cable Co., Ltd.'s, Application* (2) are, I think, strongly in favour of his views, which are also supported by a valuable judgment delivered by Lord Sumner (when Hamilton, L.J.), in *Re Lea* (*R. J.*), *Ltd.'s, Application* (3). Sect. 44 of the Act is by no means a sufficient answer to the argument that a trader, who carries on business in the manufacture and sale of the goods, or some of the goods, included in the class for which registration has been obtained, is likely to be caused substantial difficulty in carrying on his business if the name of his town is registered as a trade mark, and that confusion is likely to be caused by his use of the name. A number of examples might be given. For example, a trader in sheepskin slippers, carrying on business in Glastonbury, might well be desirous of using as his common law mark a picture of the abbey or of the Glastonbury Tor, with the word "Glastonbury" in small print beneath it, accompanied or unaccompanied by his own name printed on some part of the label. In short, I am unable to see why the respondents, in the circumstances which exist in this case, should be allowed to gain such a monopoly in respect of the word "Glastonbury" as might place a trader in Glastonbury desirous of making a perfectly honest use of the word in a position of grave difficulty, and might cause confusion in the minds of purchasers. I do not think it necessary to repeat the observations made in the opinion, to which I have already referred, and in which I entirely agree, nor should I have added anything but for the great respect which I bear to the Court of Appeal. My Lords, in my opinion, this appeal should be allowed with costs here and below.

Lord Atkin [read by Lord Thankerton]: My Lords, I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Russell of Killowen, and, as I agree with the result at which he arrives and the reasons for his decision, I desire to say but a few words. I myself agree with the finding of the Court of Appeal on the issue whether the word "Glastonburys" had become distinctive in fact. I should regard the evidence called by the plaintiffs of overwhelming strength, and it would, I think be undervaluing it to say that it proves distinctiveness in the trade only. Reliable evidence by salesmen in retail shops or departments that their customers ask for goods by the trade mark name, and that they supply them to the customer under that name, appears to me direct evidence, and indeed the best evidence, that the word is in fact distinctive. If the witnesses are credible, I do not see that they are reinforced by calling a customer or customers to speak to the same effect, and I do not myself feel that any just criticism is to be passed on the judgment of Lord Wright, M.R., pointing out that the defendants' witnesses who verified their letters were not in the trade, and not qualified as such. The letters in question were written in answer to a form of letter addressed to them by the defendants as members of the trade, "If you were offered in the ordinary way of trade slippers," etc. It seems to me a fair criticism to say that such a letter can refer only to an offer in the slipper trade, and that the witnesses who replied to it had no such trade experience.

I assume, therefore, that the plaintiffs proved that the word was distinctive in fact, but, for the reasons given by Lord Russell of Killowen, I think that it was not "adapted to distinguish." It matters little whether one says that, in the circumstances, the word was incapable of being adapted to distinguish, or that, in the exercise of his discretion, the registrar should refuse to register. I myself prefer to say that, in circumstances like the present, where the applicant seeks to register the name of the town in which both he and competitors with himself are

engaged in manufacturing the same class of goods, the name is incapable of being adapted to distinguish. It should at the outset be considered unregistrable. I do not find it necessary to invoke sect. 44, the object of which appears to me to be to give protection to traders in respect of a name which is registered, and must be treated, as adapted to distinguish,
A and not to afford a guide as to whether or not a name should be registered. I think that this appeal should be allowed, and the order of CLAUSON, J., restored.

LORD THANKERTON: My Lords, for myself I desire to express my
B concurrence in the opinion of my noble and learned friend on the Woolsack, and also in the opinion of my noble and learned friend LORD RUSSELL OF KILLOWEN, which I have had the privilege of reading.

LORD RUSSELL OF KILLOWEN [read by LORD MACMILLAN]: My
C Lords, in this case the respondents obtained (upon an application dated Nov. 23, 1933) the entry upon the register of trade marks of a mark consisting of the word "Glastonburys" registered under No. 546,401 in Class 38 in respect of "slippers, slipper-shoes and motor overshoes." Notwithstanding that the application had been duly advertised, the
D appellants were unaware of it, and did not oppose the registration; but on May 23, 1935, by notice of motion of that date they applied to have the register rectified by expunging the mark therefrom.

By an order of the Chancery Division made by CLAUSON, J., on July 14, 1936, it was ordered that the register be rectified as asked.
E The respondents appealed, and, by an order of the Court of Appeal, dated Jan. 13, 1937, the order of CLAUSON, J., was discharged, and the motion to rectify was dismissed. The appellants have now appealed to your Lordships' House, and seek to have the order of CLAUSON, J., restored.

F The relevant facts must be stated. Glastonbury is a town in Somersetshire, in which both the appellants and the respondents manufacture what may be termed sheepskin goods, including leather slippers made from sheepskins which have been tanned with the wool left on them, the wool making a warm and cosy lining to the slippers. In 1909 the
G appellants took over the business of a firm called A. Baily and Co., which had been established in Glastonbury since the year 1867. In 1899 the respondents took over the business of one Morland, which had been established in Glastonbury a few years after that of A. Baily and Co. A. Baily and Co. manufactured sheepskin slippers until about 1882,
H when they ceased to make them. The respondents began to make them in or about the year 1920, and have continued to do so until the present time. In 1924 they registered a trade mark in respect of motor overshoes consisting of a pictorial representation of two arches, and containing (amongst other words) the word "Glastonbury," but the exclusive use of that word was disclaimed. In 1927 they registered a trade mark in

respect of motor overshoes, slippers and slipper-shoes consisting of a similar pictorial representation, and containing (amongst other words and letters) the word " Glastonburys," but again the exclusive use of that word was disclaimed. In 1928 the appellants resumed, and have ever since continued, the manufacture in Glastonbury of these sheepskin slippers made of skins tanned by them with the wool on. In 1931 the respondents began to mark their slippers with the single word " Glastonburys."

Two years later, the respondents made their application to register as a trade mark the single word " Glastonburys." It is conceded that the addition of the letter " s " makes no difference, and that the word could not be registered under the Trade Marks Acts, 1905-1919, s. 9 (4), but could only be registered under subsect. (5) of that section. Under that subsection, it is not registrable at all except upon evidence of its distinctiveness as defined, i.e., except upon evidence that it was adapted to distinguish the goods of the respondents from those of others. The authorities show, however, as will appear later, that it by no means follows that, if the necessary evidence of distinctiveness is forthcoming, the mark must, or ought to, be registered.

With the evidence fresh in his mind, and upon a consideration of the whole of it, Clauson, J., who heard the witnesses, came to the conclusion that the evidence fell very far short of what was required to show that the word in question was in fact distinctive for the goods. It was, he thought, impossible to hold that the mark was adapted to distinguish the goods of the respondents from those of other persons. Rather was it adapted to occasion confusion between the goods of the respondents and similar goods manufactured by another firm (meaning the appellants) long established in Glastonbury, who in fact were selling those goods.

The Court of Appeal took a different view of the evidence, and held that the word " Glastonburys " had become distinctive in fact, because it had achieved a secondary meaning as indicating the goods of the respondents. Having arrived at that conclusion upon the question of fact, they allowed the appeal.

My Lords, if it were necessary for the purpose of our decision on this appeal to express a view as to the effect of the evidence, I would, speaking for myself, agree with Clauson, J., that it falls far short of establishing that the geographical name " Glastonburys," when applied to slippers, had, in the space of some two or three years, come to indicate primarily, not that the slippers were made in Glastonbury, but that they were made (presumably anywhere) by a particular manufacturer. That the word bore this signification in the trade is not enough, though it is a fact which may be taken into consideration by the tribunal under sect. 9 (5). In the case of household articles in general use, such as slippers, the meaning which the word in question conveys to the purchasing public is of vital importance. In the present case, the direct evidence given by the public does not support the view of distinctiveness. No such direct evidence was tendered by the respondents. It is true that some of the trade witnesses testified that their customers ordered " Glastonburys " or " Glastonbury slippers," and that in response to such orders they supplied the respondents' goods, but this evidence (in the absence of the customer's explanation) is subject to the criticism that such expressions may in fact have been used as indicative only of the place of manufacture.

However, I am prepared to decide this appeal upon the assumption that the true view of the evidence is that which was adopted by the Court of Appeal. Even upon that footing, I am of opinion that, upon the facts of this case, this appeal should be allowed. It appears to me to be, from one aspect, a stronger case for refusing registration than that of *Re Liverpool Electric Cable Co., Ltd.'s, Application* (2). That decision laid down no new law. It was based upon the view, well-established by previous authority, that distinctiveness in fact is not conclusive upon the questions whether a mark is "distinctive" as defined in sect. 9, and whether it ought to be registered. Let me cite from the opinion of LORD PARKER OF WADDINGTON in *Trade Marks Registrar* v. *Du Cros* (*W. & G.*), *Ltd.* (1), which expressed the unanimous views of your Lordships' House. He said, at p. 637 :

> But the tribunal is not bound to allow registration even if the mark be in fact distinctive. A common law mark is still not necessarily registrable. If the tribunal finds that a mark is anywhere, or among any class of people, in fact, distinctive of the goods of the applicant, it may be influenced by this fact in determining whether it is adapted to distinguish these goods from those of other persons, but distinctiveness in fact is not conclusive, and the extent to which the tribunal will be influenced by it must, in my opinion, depend on all the circumstances, including the area within which and the period during which such distinctiveness in fact can be predicated of the mark in question.

Much the same views had been expressed by HAMILTON, L.J., in *Re Lea* (*R. J.*), *Ltd.'s, Application* (3), when he said, at p. 463 :

> Further the Act says " adapted to distinguish " ; the mere proof or admission that a mark does in fact distinguish does not *ipso facto* compel the judge to deem that mark to be distinctive. It must be further " adapted to distinguish," which brings within the purview of his discretion the wider field of the interests of strangers and of the public.

What are the salient facts of the present case ? The word " Glastonburys " is an obviously geographical name indicating a locality—namely, the town of Glastonbury. In the town of Glastonbury there are (and were at the date of the registration) two manufacturers of these sheepskin slippers—namely, the appellants and the respondents. The town of Glastonbury enjoys a reputation connected with sheepskin slippers, arising from the fact that it is famous for its efficient tanning of the sheepskins with the wool on, which are used in the manufacture of the slippers. The buyer for the shoe department of Frederick Gorringe, Ltd., testified as follows :

> It is customary for manufacturers of slippers whose factories are not situate in Glastonbury to make a big selling point of the fact that the skins from which their slippers are made were either tanned or finished in Glastonbury, and they

therefore expect to obtain better prices solely for the reason that their skins had been treated in Glastonbury. I have always been prepared to pay more for a slipper which has been produced from a skin treated in Glastonbury than one treated elsewhere as there is something in the Glastonbury tanning which does not appear to be produced elsewhere.

In these circumstances, ought the word "Glastonburys" to have been registered as a trade mark for slippers in the first instance, and ought it A
now to be allowed to remain on the register? In my opinion, the answer to each question should be in the negative. With the mark on the register, no person who manufactured slippers in Glastonbury, or sold slippers manufactured by someone else in Glastonbury, could advertise his goods as being what in fact they were—namely, "Glaston- B
bury slippers." It is no answer to say that the appellants can, notwithstanding the registration, continue their practice of marking their goods as "made in Glastonbury." They, and any future manufacturers of slippers in Glastonbury, and their respective retail customers, ought not to be hampered or restricted, by the presence of this mark upon the C
register, in selecting the particular form of words by which they desire to describe their goods as being products of a town which enjoys a reputation in connection with the manufacture of sheepskin slippers. Just as the Court of Appeal in a subsequent case—*Re Société des Usines Chimiques Rhône-Pôulenc's Application* (4)—thought that the word D
"Livron" could not properly be registered under sect. 9 (5) in respect of tonic medicines for human use, because it was the name of a French town where similar medicines were manufactured, so, in my opinion, this word "Glastonburys" cannot properly remain on the register in respect of "slippers, slipper-shoes and motor overshoes." For these reasons, E
I would allow the appeal and restore the order of CLAUSON, J.

My Lords, there are two other matters which arose on the hearing of this appeal to which I think it right to refer. One passage in the judgment of LORD WRIGHT, M.R., has given rise to the suggestion that he stated that certain witnesses were not qualified to give evidence on the F
issue of distinctiveness, because they were not engaged in the slipper trade, but were merely members of the public. When the context is examined, it becomes clear that LORD WRIGHT, M.R., said no such thing. It would be strange if he had, for, in relation to the meaning of the words or marks when applied to goods in everyday use, the evidence of the G
public is of the highest value. LORD WRIGHT, M.R., was dealing with the evidence of some eleven witnesses who had given evidence, as members of the public, to the effect that by Glastonbury slippers they understood slippers manufactured in Glastonbury. Many of them were in fact persons engaged in various trades, but not in the slipper trade. In H
regard to them, LORD WRIGHT, M.R., said that they "are not really in the trade at all, are not really familiar with the circumstances of the trade, and are not really qualified to give evidence on the particular issue." It is obvious, I think, that this language is based on a mistaken belief that the witnesses had been put forward as witnesses engaged in

the slipper trade. If that had been the fact, the language used would have been true. As members of the public, they were without doubt qualified to speak. LORD WRIGHT, M.R., never meant to suggest a contrary view.

A second matter arose in connection with these witnesses. The appellants circularised 91 members of the public asking them to answer the following question:

> If you were offered in the ordinary way of trade, slippers described as "Glastonbury slippers," what would the word "Glastonbury" mean to you?

They received 83 replies. To save expense, they filed affidavits by 11 only of those who had replied, but, in order to prove that the 11 were a proper and fair sample of the bulk, the remaining 72 replies were exhibited to an affidavit. This procedure was the subject of severe comment in the Court of Appeal. No doubt it was technically wrong, but the appellants not unnaturally shrank from the great expense of filing some 70 affidavits. It will be wiser, perhaps, in a similar case in the future, to file an affidavit merely stating the number of the other answers which have been received, and that they are open to inspection by the other side's advisers. The court will then be protected from the embarrassment of being in possession of documents which are in no sense evidence of the facts stated therein.

LORD MACMILLAN: My Lords, speaking for myself, I desire to express my entire concurrence in the opinion of my noble and learned friend which I have just had the privilege of reading, and also in the opinion which has been delivered from the Woolsack.

Appeal allowed with costs.

Solicitors: *Woodham Smith & Borradaile* (for the appellants); *Bridges, Sawtell & Co.*, agents for *Gould & Swayne*, Glastonbury (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

R. *v.* SLENDER.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and Macnaghten, JJ.), **April 4, 5, 1938.**]

Criminal Law—Obtaining money by false pretences—Money similarly obtained two days before—Use of different pretence—Admissibility of evidence of previous facts.

The appellant and another man were convicted of obtaining money by false pretences. They had obtained two sums of 30*s.* each from a lady living in Cheltenham. They said that they had been involved in a lorry accident at Colesbourne, and that they required the money to spend the night in Cheltenham. On this occasion, the appellant said his name was Ted Williams. It was proved that the two men were brothers-in-law, each of them was on the dole, neither of them had anything to do with driving a lorry, being at the time engaged upon compulsory relief work for the local authority. P., who lived just outside Cheltenham, gave evidence that, two days before the happening of the facts stated in the charge, the same two men called upon him, said they wanted to go to Rissington, where they had work, and required the money for the journey there. On this occasion, the appellant gave the name of Smith. The evidence was admitted, as proving the intent to defraud :—

Held : the evidence was inadmissible.

[**EDITORIAL NOTE.** Guilty knowledge or design may be proved by evidence of acts similar to those which form the basis of the charge. Such evidence may also be given to prove that the act charged formed part of a system. The evidence, however, must be of transactions having such a *nexus* with the offence charged that it forms part of the evidence by which that offence is proved. The evidence sought to be adduced here is of two independent acts of fraud, which can be shown to be fraudulent without reference to similar acts and such evidence is not therefore admissible. It is otherwise where the frauds are of a similar character and show a systematic course of swindling.

As to Evidence of Similar Offences, see HALSBURY, Hailsham Edn., Vol. 9, pp. 186, 187, para. 270 ; and for Cases, see DIGEST, Vol. 14, pp. 384-387, Nos. 4052-4069.]

Case referred to :

(1) *R.* v. *Fisher*, [1910] 1 K.B. 149 ; 14 Digest 372, *3925* ; 79 L.J.K.B. 187 ; 102 L.T. 111.

Appeal by leave against conviction for obtaining money by false pretences of the appellant at the quarter sessions for Gloucester.

S. R. Benson for the appellant.

R. C. Hutton for the Crown.

Humphreys, J. [delivering the judgment of the court] : In this case the appellant, Nicholas William Gilbert Slender, was convicted by a jury before the recorder at Gloucester Quarter Sessions of two small offences, consisting of obtaining with intent to defraud two sums of 30*s.* each from a Miss Sampson, who lives on the outskirts of Cheltenham. He applied to this court for leave to appeal against that conviction, and he appears to have settled his own notice of appeal. He inserted in that notice a number of reasons, but it is necessary to refer to only one, which he puts in this way :

> The additional evidence the police got at the last minute was nothing whatever to do with this case of Miss Sampson and the recorder ordered an identification parade for me and the other man what was with me in this case of Miss Sampson.

Then he goes on to say that Mr. Price gave evidence against him, and he submits that that evidence was wrongly admitted. The matter having come before the judge in chambers upon that point, and, as we are told, on other grounds, which may be summarised as contending that the trial was generally unsatisfactory, the judge gave leave to appeal, and the matter has been argued on each side before this court.

The case which was tried at quarter sessions was a case of extreme simplicity, very clear, and apparently quite conclusive. The false pretences alleged were several. The first false pretence was that two persons, the appellant and another man, had obtained 30*s.* from a Miss Sampson by falsely pretending that they had just been involved in a lorry accident at Colesbourne, that Amos Deacon, who was the other man, had been driving the lorry, and that he was suffering from the effects of the accident. It was admitted by the prosecution, and ruled by the recorder, that this false pretence was not proved. The false pretence relied upon by the prosecution was this. They had come from Colesbourne, and would have to spend the night in Cheltenham, and needed money for their expenses.

The evidence of Miss Sampson was shortly to this effect. She said that on Monday, Jan. 24, these two men came to her house at about 7 o'clock in the evening. They said that they had had a lorry accident at Colesbourne, that Deacon was the driver, and was very much upset, that they would have to spend the night in Cheltenham, and that they wanted some money. They said that 15*s.* would do, and promised to return it to her. Thereupon she handed over 15*s.* to the appellant, who then said that the other man would also want some money for his own use, and another 15*s.* was handed over. She added that she saw them again on the next day, Tuesday, at about 4 p.m., when they came again and said that they had spent their money, and that Deacon's foot, which had been injured in the accident, was badly hurt and had been dressed in hospital, or, at all events, had been dressed somewhere. They said that they wanted some more money, and she said in evidence : "I asked Mr. Slender if they wanted any more money." She was asked : "What did Slender say to that ?" The answer was : "Of course he agreed." Then she was asked : "How much did you hand over ?" She replied : "I handed them another 30*s.*, and they promised they would repay the money." That was the end of her evidence. She was cross-examined with the object of showing that it was not on account of the false pretence laid in the indictment that she parted with her money, but she made it perfectly clear that it was. She made it clear that it was because they said that they had had an accident at Colesbourne and had to stay the night in Cheltenham, and, to use her expression, "They were stranded," that she gave them the money. The prosecution were in a position to show that these statements were false. It was proved that these two men were living in Cheltenham, that they were brothers-in-law, each of them being on the dole, that the work they were doing had nothing whatever to do with driving a lorry, that neither of them had a licence for driving a lorry, and that the work they were engaged upon was compulsory relief work for the local authority—that is to say, work on the roads—for which work they were given money for their families. If that evidence was believed (and it was not cross-examined to), it was quite clear that they had made false statements, and that, as a result, they had been handed this money. It might well have been left to the jury to find that they had obtained the money by these false statements with intent to defraud, but, for some reason or other, it was thought desirable by the prosecution, perhaps to add to the strength of the case, to bring in evidence of another fraud committed by these two persons two days before in Cheltenham, and for that purpose the prosecution proposed to call a Mr. Price.

If evidence is to be called which relates to some other offence, which is not charged in the indictment, but which it is said can be proved against the prisoner in the dock, that evidence can be given only within certain clearly defined and closely circumscribed limits. There are many judgments of this court, and of other courts, showing what these limits are where the charge is one of obtaining money by false pretences. The leading case, and the one referred to in the present case, is that of *R.* v. *Fisher* (1). The judgment of the court, which was this court, the Court of Criminal Appeal, was delivered by CHANNELL, J., and part of that judgment was quoted to us by counsel for the prosecution. The important words, however, which were not read to us, are in the passage which comes before the one which was read to us, and it is well that that part of the judgment, which is material to this case, should be read. CHANNELL, J., after referring to the facts, said, at p. 152:

> The question is whether this evidence was admissible on the authority of the cases in which it has been held that evidence is admissible to prove that the prisoner has committed other offences besides the one charged in the indictment. The question is one which has frequently come before this court and before judges at the assizes, and it is one that is not always easy to decide. The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence.

The passage after the one I have just read was the one relied upon by counsel for the prosecution. That passage, however, consists of illustrations and examples given by CHANNELL, J., of cases which illustrate the application of the principle to particular cases, and, in the course of giving those examples, he uses, as in many other cases, the expression "the system." The word "system" is perhaps an elusive word, because it sometimes gives difficulty to persons who have to construe it, in that they ask themselves "system of what"? The judgment of CHANNELL, J., makes the meaning of the expression "system" quite clear in the words he uses at p. 153:

> . . . if all the cases had been frauds of a similar character, shewing a systematic course of swindling by the same method, then the evidence would have been admissible.

That being the principle upon which evidence relating to another charge can be called, counsel for the prosecution called Mr. Price, who lives quite close to where Miss Sampson lives, just outside Cheltenham, He spoke to an incident on Jan. 22, a Saturday, two days before these men saw Miss Sampson. He said that the two men called at his house between 5.30 p.m. and 6 p.m. The appellant Slender said that they were down on their luck, that they wanted to go to Rissington where they had work to go to at the aerodrome there, that they wanted to get the 6.50 p.m. bus for that purpose, and that they wanted some money. Mr. Price said that he was impressed, and believed that story, and that he handed over one pound, and that Slender said he would pay him back at the rate of 5*s*. a week. He went inside the house and wrote out an I.O.U. in which he gave the name of Smith. That was the evidence of Mr. Price, and, in the judgment of this court, that evidence was entirely inadmissible on a charge of obtaining money on the following Monday from Miss Sampson by the false pretence alleged in the indictment. It did not assist the prosecution to prove what it had to prove, nor did it tend to prove either that the false pretences were made or that they were false. Nor were the false pretences the same as in the case of Miss Sampson. The statement made was quite different, in fact exactly opposite. They said they wanted the money because they wanted to go to some other place.

That evidence, being quite inadmissible, was used by the recorder many times in the course of the trial in order to point out to the jury that when the accused visited Mr. Price they used different names from those they used when visiting Miss Sampson. The first occasion on which that appears is in the evidence which was given by Miss Sampson. In the course of her evidence, and before Mr. Price was called, she was asked what names they used, and she said that Deacon had written down " Mr. D. Speedles of Green Road, Mitcheldean," and that, on the Tuesday, Slender, the appellant, had written down " Ted Williams of Mitcheldean." These names and addresses were exhibits in the case. The recorder then proceeded to make this statement :

> Members of the jury, I want you to have these. It is not suggested that it was by means of those exhibits that these men obtained this money. What is suggested is that by each of them writing those names that are on those pieces of paper they were providing evidence which is being used to-day before you as evidence of an attempt to defraud, but they have nothing to do with this money.

The recorder went on to say that it was perfectly true that the lady would have handed them the money, whatever names they chose to use, and that in truth it was perfectly immaterial, but that the piece of paper was put in to show intent. In our opinion, it shows nothing of the sort. When Mr. Price came to give evidence, it was shown that they had used different names, and a document, which was in fact an I.O.U. written by Slender in which he used the name of Smith, was handed to the recorder. He then made this observation :

> The jury will see that, and they will compare the handwriting with Exhibit 2 [the document given by Slender to Miss Sampson]. Slender, first of all, when he meets Miss Sampson, becomes Ted Williams of Mitcheldean, and now he had become somebody else quite different, Mr. Smith of Rissington Works Aero Camp.

Then he makes this observation, one of the many observations to the jury in the course of the case which have been referred to as "interlocutory summings up":

> Members of the jury, this piece of paper is not put in to suggest to you that it was by means of that paper that the money was obtained. It is merely put in as evidence of an intent to defraud. The prosecution may say that a person who is sailing under such different colours as Williams and Smith is not acting in a very straightforward way.

That, in our view, is a clear misdirection, and, if that was the ground, as it appears to have been the ground, upon which the recorder thought it right to admit the evidence of Mr. Price, it was a most unfortunate ground to have chosen. While it does not prove that which the prosecution has to prove—that is, the case charged in the indictment for obtaining money by false pretences from Miss Sampson—it nevertheless obviously helps the jury to form the view that these men were rogues, obtaining money from different people, and that they are persons of bad character. Mr. Price, having given that evidence, also said that these men came again on Monday, Jan. 24, a little after 6 p.m.—that is, a little earlier than the time they approached Miss Sampson—and asked him for more money. He refused, and told them that he had placed money in the hands of the police, and that, if they liked to apply to the police, the police would, if they were satisfied with their *bona fides*, give them some of the money. The history of both these men is sufficient to show why they did not desire to go to the police and ask for the money.

That was the case for the prosecution. No evidence was called for the defence, and in that state of affairs the recorder proceeded to sum up. He was almost embarrassingly complimentary to the counsel who appeared for the accused. He referred to him, as he is, as the learned recorder of Abingdon, and said that he had defended his clients with amazing ability, which did not help Slender, because he made it clear that he was not all at one with his learned counsel. The recorder having made a number of observations, occupying a number of pages in the summing up, said this:

> You have to be satisfied that the false pretences were false, and that there was an intention in the prisoners' minds to defraud somebody: it does not matter whether it was the actual victim in this case, but to defraud somebody. For that purpose you are entitled to ask yourselves why, if there was no intent to defraud, the man Slender should change his name so often within so short a space. You remember, first of all, that he becomes Smith, and then he becomes Williams. But it is very important that you should be satisfied that it was as the result of the false pretences, or as the result of one of them, because the prosecution has not got to prove that all the pretences are false. It is sometimes very difficult. You have got to be satisfied that the fount of Miss Sampson's charity began to run, if I may use a metaphor, when the tap was turned on by the false pretences of Slender, acting on behalf of both of them.

In our view, it was most unfortunate that the recorder should have dealt with the question of intent to defraud by saying that the evidence of it was the evidence offered by Mr. Price—namely, that the appellant had used different names. The recorder goes on to refer to the evidence of Mr. Price, and he says:

> You will remember that Walter Price was the man who said that on Saturday,

> Jan. 22—that is, the Saturday before the charge in this case—these two men, whom he identified at an identification parade, came to him and told him this story that they were going to catch a bus to Rissington Aerodrome, where they were going to get work. Now, chronology in this case you may regard as of some importance, as showing, not that these two prisoners were the sort of people to commit this offence, because as I told you before, it would not be fair to use it for that purpose, but that they had quite a definite system in their minds, or in the mind of Slender, with which the other prisoner acquiesced, of either obtaining, or attempting to obtain, money from such people as could be induced to part with it.

What was in the mind of the recorder when he used that expression it is difficult to say, but that it was a satisfactory direction cannot be said. The recorder had apparently formed the opinion, although he did not express it until after the accused had been convicted, that the evidence of Mr. Price was not evidence of another crime at all, and, after the two men had been convicted, he said, in referring to the case of Mr. Price, that it would be difficult to sustain an indictment on that, because it was a promise to do something in the future. If that is so, it becomes increasingly difficult to understand how the evidence of Mr. Price becomes evidence in this case. Finally, the recorder made this observation in his summing up:

> Does the fact that the same statement [that is to say, that they were obliged to stay in Cheltenham] had been made one hour before, and unsuccessfully made, to Mr. Price, who had already parted with his money, suggest to you that this was a systematic attempt by a false pretence to get money out of anyone who could be persuaded to part with it ?

It is necessary to say no more than that that statement, in the opinion of this court, does not assist the matter.

As a result of the conduct of this case and the various observations which the recorder made from time to time in his summing up, this court has come to the conclusion that this conviction cannot be sustained. What view the jury would have taken if this inadmissible evidence had not been admitted it is not possible for this court to say. The court has already expressed the view that in all probability the jury would have convicted, because the case was short and clear. Mr. Price's evidence, however, was clearly inadmissible, and highly prejudicial. It is impossible to say what effect that evidence may have had on the jury, and it is impossible for this court to say that this jury must inevitably have come to the same conclusion if that evidence had not been admitted. For this reason, this appeal must be allowed, and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Applied. BAILEY *v.* BULLOCK.
[1950] 2 All E.R. 1167.

GROOM *v.* CROCKER AND OTHERS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **March 25, 28, 29, April 13, 1938.]**

Insurance—Motor insurance—Absolute conduct and control of proceedings—Duty of insurance company and its legal advisers.
Libel—Litigation—Letter passing between solicitors for plaintiff and defendant—Admission of negligence in motor accident—Malice—Damage.
Solicitors—Negligence—Action on motor insurance policy—Solicitor giving effect to pooling arrangement among insurance companies.

The plaintiff took out with an insurance company a motor insurance policy containing a clause that the plaintiff would not incur any expense whether in respect of litigation or otherwise or make any payment, settlement, arrangement, or admission of liability for which the company might be liable under the policy without the written authority of the company, and that the company should have absolute conduct and control of all or any proceedings against the plaintiff. The plaintiff's car was run into by a motor lorry, the collision being caused solely by the negligence of the lorry driver. A passenger in the plaintiff's car was seriously injured, and issued a writ against the owners of the lorry and also, at their request, against the plaintiff. The latter informed the insurance company, and left the matter in its hands, as he was bound to do under the policy. The company sent the papers to its solicitors, who entered an appearance to the writ and acted in the conduct of the defence. Neither the company nor the solicitors ever at any time communicated with the plaintiff in any way, and eventually the solicitors delivered a defence on behalf of the plaintiff admitting that the accident was caused solely by his negligence and wrote a letter to this effect to the solicitors opposing them. Having accidentally found out what was happening, the plaintiff protested to the local agent of the insurance company, to which agent the latter wrote: "If we had repudiated liability we ran a very serious risk of the court holding a different view." At the trial of that action, judgment was entered against the present plaintiff for £1,124 12*s.* 10*d.*, damages and costs, which sums were at once discharged by the insurance company. The plaintiff then claimed damages against the solicitors and the insurance company for breach of duty, negligence and libel:—

HELD: (i) the terms of the policy clearly entitled the insurers to nominate a solicitor to act in the conduct of the proceedings.

(ii) such solicitor was bound to act *bona fide* in the common interest of the insurers and the insured, and, upon the facts he had not done so.

(iii) the damages for breach of duty were only nominal, since the sums recovered in the action were at once paid by the insurance company. The plaintiff could only sue the solicitors in contract and had no cause of action against them in tort.

(iv) assuming that the occasion upon which the letter admitting negligence was written was a privileged one, there was evidence of malice.

Decision of HAWKE, J. ([1937] 3 All E.R. 844), *affirmed subject to a reduction of damages.*

[EDITORIAL NOTE. Insurance companies have found it necessary for the efficient working of their business to insert clauses in policies which give them full control over litigation arising thereunder. The present case establishes a definite limit to that control, and they cannot in terms admit that the insured has been negligent contrary to the fact without their solicitors incurring a liability for breach of duty and possibly also the insurance company. The difficulties in the present case arise from the pooling arrangements made between insurance companies, intended to relieve them of the heavy cost of fighting cases where it is tolerably clear that the damages must be paid by one party or the other. The only difference between the view taken in the court below and that taken in the Court of Appeal is that, upon the claim based on the negligence of the solicitor, the plaintiff is held to be entitled to nominal damages only, as the cause of action was in contract and not in tort, and no actual damage was proved to have been suffered.

AS TO DUTY OF SOLICITORS, see HALSBURY, 1st Edn., Vol. 26, Solicitors, pp. 755, 756, para. 1253; and FOR CASES, see DIGEST, Vol. 42, pp. 91-100, Nos. 826-939.

AS TO MALICE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 499-503, paras. 613, 614; and FOR CASES, see DIGEST, Vol. 32, pp. 156-161, Nos. 1878-1940.]

Cases referred to:

(1) *Davies* v. *Lock* (1844), 3 L.T.O.S. 125; 42 Digest 108, *1027*.

(2) *Bean* v. *Wade* (1885), 2 T.L.R. 157; 42 Digest 102, *962*.

(3) *Wilson* v. *United Counties Bank, Ltd.*, [1920] A.C. 102; 17 Digest 155, *562*; 88 L.J.K.B. 1033.

(4) *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399; Digest Supp.; 105 L.J.K.B. 309; 154 L.T. 365.

(5) *Addis* v. *Gramophone Co., Ltd.*, [1909] A.C. 488; 17 Digest 78, *1*; 78 L.J.K.B. 1122; 101 L.T. 466.

(6) *Morley* v. *Moore*, [1936] 2 K.B. 359; [1936] 2 All E.R. 79; Digest Supp.; 105 L.J.K.B. 421; 154 L.T. 646.

(7) *Walsh* v. *Julius White & Bywaters* (1927), *Times Newsp.*, July 13.

(8) *Hobbs* v. *London & South Western Ry. Co.* (1875), L.R. 10 Q.B. 111; 17 Digest 95, *106*; 44 L.J.Q.B. 49; 32 L.T. 252.

(9) *Bell* v. *Midland Ry. Co.* (1861), 10 C.B.N.S. 287; 17 Digest 123, *315*; 30 L.J.C.P. 273; 4 L.T. 293.

(10) *Thompson* v. *Hill* (1870), L.R. 5 C.P. 564; 36 Digest 222, *635*; 39 L.J.C.P. 264; 22 L.T. 820.

APPEAL from a decision of HAWKE, J., sitting with a common jury, dated July 27, 1937, and reported in [1937] 3 All E.R. 844.

Sir William Jowitt, K.C., *H. D. Samuels, K.C.*, and *Valentine Holmes* for the appellants (the defendants in the action).

D. N. Pritt, K.C., and *Gerald Gardiner* for the respondent (the plaintiff in the action).

Jowitt, K.C.: The insurance company are entitled to do what they did without consulting their insured, and without even informing him. It is a question of construction, and they had "absolute conduct and control" of the proceedings. They could do quite literally what they liked, provided they were not moved by fraud, conspiracy or the desire to cause an injury to the insured. It is impossible to write in any other implied term, such as that they were to act only in the interest of the insured. As to damages, are they at large or are they actual? As the real relationship between the parties is contractual, the damages are therefore *ex contractu* and only nominal damages can here be awarded: *Bean* v. *Wade* (2), *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* (4), and *Addis* v. *Gramophone Co., Ltd.* (5). There is no evidence that the insurable reputation of the plaintiff was damaged at all. The so-called libel was privileged.

Pritt, K.C.: In a case where the insured's character is necessarily involved, the insurance company cannot sacrifice it without giving their client a chance to conduct his defence himself. Even if the insurance company could do so, their solicitors could not, for they are solicitors also to the client, and owe him professional duties. [Counsel referred to *Walsh* v. *Julius White & Bywaters* (7).] If this must be treated as an action of contract, then it is not the law that nothing can be given except for actual direct loss. General damages for breach of contract are of every-day occurrence. If it be necessary, in order to recover general damages, this claim can be brought in tort: *Hobbs* v. *London & South Western Ry. Co.* (8), *Bell* v. *Midland Ry. Co.* (9), *Thompson* v. *Hill* (10). It is impossible to suppose that the libel was privileged.

Samuels, K.C., in reply: The occasion on which the letter was written was privileged. It was the duty of the solicitor to answer the inquiry of the other side. On this libel, the damages are excessive and the verdict perverse. As to the measure of damages, the duty of a solicitor to his client being *ex contractu*, this is therefore an action in contract, and the only measure of damages is the pecuniary loss actually suffered. There is no case reported where any client has ever received more than the actual pecuniary loss for damage caused him by his solicitor.

SIR WILFRID GREENE, M.R.: This is an appeal by the individual defendants, a firm of solicitors carrying on business under the name of William Charles Crocker, against a judgment for £3,132 12*s.* 10*d.* with costs recovered against them in an action tried before HAWKE, J., and a common jury.

There is no dispute about the facts. On Aug. 11, 1936, a motor car driven by the respondent, William Groom, came into collision with a motor lorry belonging to a firm called Tear Brothers, on the road leading from Spalding to Wisbech. The driver of the lorry was prosecuted and convicted of dangerous driving. The respondent took proceedings against Tear Brothers, who denied liability but paid £100 into court, which the respondent took out in satisfaction of his claim. The respondent's brother, Aubrey Groom, who was a passenger in the car, received serious injuries. He commenced proceedings against Tear Brothers, but, as they were asserting that the accident was due to negligence on the part of the respondent, he joined the respondent as a defendant in his action.

The respondent was the holder of a motor car policy issued by the defendants, the National Farmers Union Mutual Insurance Society, Ltd., which I will call the Farmers Union. Under this policy, he was insured against liability to third parties, including passengers, in respect of injury caused in connection with the car which he was driving. One of the conditions of the policy was that the Farmers Union, if it so desired, was to have absolute conduct and control of any proceedings brought against the insured, and it is upon the true meaning and effect of this clause that one of the issues in this appeal depends. In accordance with this clause, the respondent handed the writ and statement of claim in his brother's action to the local agent of the Farmers Union to deal with, and for a time he appears to have taken no further interest in the matter.

The Farmers Union on Feb. 21, 1935, instructed the appellants to enter an appearance for the respondent in Aubrey Groom's action, and asked the appellants to report upon the case. They did so on Feb. 25, and expressed a clear opinion that Tear Brothers were alone responsible, an opinion which the officials of the Farmers Union had already with equal clearness formed. I need not elaborate this matter, since it is abundantly clear that both the appellants and the Farmers Union throughout took the view that the respondent was not guilty of any negligence, and no suggestion to the contrary was put forward on behalf of the appellants before us.

If these had been the only facts in the case, the duty of the appellants, both to the Farmers Union and to the respondent, clearly would have been to deny liability and to defend the action, and it is obvious that they would have done so if it had not been for another matter, which I will now proceed to state.

Tear Brothers were insured with the Motor Union Insurance Co., which I will call the Motor Union. It so happened that the Motor Union were dealing with another claim in which they and the Farmers Union were concerned. In that claim, the positions were reversed. A passenger in a car driven by the holder of a policy in the Farmers Union was claiming damages from that driver, and also from the owners of another car who were insured with the Motor Union. The Farmers Union considered that their insured was wholly to blame, and that accordingly there was no defence. In these circumstances, the Motor Union and the Farmers Union came to an agreement whereby the aggregate amount which would fall to be paid in the two cases should be contributed by them in equal shares, an arrangement which the Farmers Union thought would result in their being " in pocket to the extent of several hundred pounds."

The appellants were informed of this arrangement and referred to it in their report. They were in hopes that it would be possible to arrive at a settlement of Aubrey Groom's action, but this, in the result, did not prove to be possible.

Meanwhile, it became necessary to put in a defence on behalf of the respondent, and on Mar. 19, 1935, an arrangement was made between Mr. Clements, a managing clerk in the employment of the appellants, and Messrs. Ponsford & Devenish, the solicitors for the Motor Union, by which the latter were to deliver a defence on behalf of Tear Brothers denying negligence, and the appellants were to deliver a defence on behalf of the respondent admitting negligence. The object of this manœuvre is clear. It was adopted in the hopes that less damages would be awarded against the respondent than against Tear Brothers. with the result that the aggregate liability in the two cases which was to be divided between the Farmers Union and the Motor Union would be reduced.

In accordance with this ingenious scheme, the respondent on Mar. 25 delivered instructions to counsel to settle a defence admitting negligence. Mr. Clements stated in evidence that he asked the opinion of counsel on the telephone as to whether or not the course proposed was proper, and that counsel advised that it was. It is difficult to believe that the recollection of Mr. Clements was not at fault in this respect, but in any case Sir William Jowitt did not suggest that the advice so said to have been given would be sufficient to excuse the appellants from liability.

The defence was settled accordingly, and by it the respondent was made to admit:

> for the purposes of this action and not otherwise that he was guilty of the negligence set out against him in the statement of claim.

The injuries and damage alleged were denied.

The allegations of negligence thus admitted were in common form, and included allegations that the respondent (*a*) drove at an excessive speed, (*b*) drove upon the wrong side of the road, (*c*) failed to give warning, and (*d*) failed to keep any, or any proper, look-out. It is not necessary to comment upon the seriousness of an admission of these allegations, and it is upon that admission, made upon the appellants' instructions, with the consequence that resulted from it, that the first claim in the action—that for damages for breach by the appellants of their duty to the respondent as his solicitors—is based.

On receipt of the defence, Aubrey Groom discontinued the action against Tear Brothers. Attempts were made to tempt him by payments into court, but without success. His action came on for hearing on Nov. 1, 1935, before Goddard, J. The only issue was that of damages, and Aubrey Groom was awarded against the respondent £924 damages and the costs of the action, which were subsequently taxed at £208 12*s*. 10*d*. These sums were paid by the Farmers Union.

When the appellants delivered the defence to Messrs. Metcalfe & Co., Aubrey Groom's solicitors, on Mar. 26, 1935, they did so under cover of a letter upon which the second claim in the present proceedings—that for damages for libel—is based. Messrs. Metcalfe & Co. had written to the appellants asking if they were prepared to agree a plan, in which case they, Messrs. Metcalfe, would submit one. The appellants replied in the following terms:

> We have your letter of the 25th instant, and we enclose herewith our client's defence service of which kindly accept by post and from which you will observe he admits that he was negligent on the occasion referred to in the statement of claim and therefore there will be no necessity for you to produce a plan.

In the original letter, the word "he" following the word "observe" was omitted, but it was agreed before us that the letter must be read as though it had been inserted.

In order to complete the statement of facts, there is one more matter

to be mentioned. On May 3, 1935, the respondent, having discovered that the defence delivered on his behalf admitted negligence, called on Mr. Gethin, the local agent of the Farmers Union. Mr. Gethin on the same day reported to his head office that the respondent was " very cross that without his consent negligence should be admitted when in
A fact no one seriously suggests that he was negligent," and asked for an explanation. He wrote to the respondent on the same day, informing him that he had written to the head office of " your strong objection to the fact that negligence on your part in connection with the recent accident has been admitted without your consent," and promising that, if he got
B any satisfactory explanation, he would let the respondent have it. The reply received from the head office did not satisfy Mr. Gethin, for it was based upon the statement that, " if we had repudiated liability, we ran a very serious risk of the court holding a different view and giving a decision against us," a statement so lacking in candour that Mr. Gethin,
C to his credit, declined even to put it to the respondent. Some further correspondence took place between Mr. Gethin and the head office, but, in the result, no explanation was ever given to the respondent.

I will deal first with the case of breach of duty. It is not disputed that the relationship of the appellants to the respondent was that of solicitor
D and client. Indeed, no question could have been raised as to this, since, when the appellants refused the respondent's request to have inspection of documents in their possession with a view to the institution of the present proceedings, CLAUSON, J., held, upon an originating summons by the respondent, that the relationship was that of solicitor and client,
E and ordered inspection to be given. The jury found that the appellants had been guilty of negligence and breach of duty, and awarded £1,000 damages under this head. It is said, on behalf of the appellants, that, having regard to the terms of the policy, the finding of negligence cannot stand, and that, if this view is wrong, there was no evidence to justify
F a finding of anything more than nominal damages. In addition to the £1,000, there was included in the £3,132 12*s.* 10*d.* awarded to the respondent by the judgment a sum of £1,132 12*s.* 10*d.*, being the amount of the damages and costs which the respondent became liable to pay under the judgment in the action brought against him by Aubrey Groom. No
G question was put to the jury with regard to this, since the judge ruled that it was recoverable as a matter of law, and the parties did not invite him to put the question formally to the jury. It is said by the appellants that the ruling of the judge on this matter was wrong, and that there was no evidence of any damage to the respondent in respect
H of this sum.

The facts which I have set out in detail can, for the purposes of the question of liability, be summarised in a sentence. In order to enable the Farmers Union to obtain for themselves a pecuniary advantage under an agreement with which the respondent had no concern, the appellants, acting as solicitors for the respondent, without obtaining, or indeed seeking, his consent, committed him to an admission of allegations which they did not believe to be true, an admission which was calculated to be damaging to his reputation as a member of society, and was intended to lead, as it in fact led, to the result of a judgment being given against him. It is argued on behalf of the appellants that this conduct constituted no breach of the appellants' duty in view of the provisions of the policy, which I will now proceed to examine.

The relevant provisions of the policy are as follow :

> 1. The insured . . . shall give all such information and assistance as the society may require to enable the society to settle or resist any claim as the society may think fit.
>
> 2. The society shall, if and so long as it so desires, have absolute conduct and control of all or any proceedings against the insured . . . and shall be entitled to use the name of the insured to enforce for the benefit of the society any order made for costs or otherwise or to make or defend any claim for indemnity or damage against third parties.

These provisions do not in terms refer to the position of solicitors, but they clearly entitle the insurers to nominate a solicitor to act in the conduct of the proceedings to which they relate. The duty of the solicitor so nominated to the insured for whom he is to act cannot, of course, be the same as that which arises in the ordinary case of solicitor and client, where the client is entitled to require the solicitor to act according to his own instructions. The whole object and usefulness of these provisions would be defeated if the insured were to be entitled to interfere with the conduct of the proceedings in that way. The insured, in my opinion, is not entitled to complain of anything done by the solicitor upon the instructions, express or implied, of the insurers, provided it falls within the class of things which the insurers are, as between themselves and the insured, entitled to do under the terms of the policy when properly construed. A solicitor who, acting on instructions, express or implied, from the insurer, does something to which the insurers, as between themselves and the insured, are not entitled to require the insured to submit to, would, in my view, be acting beyond his competence ; and, if what he does is something which, in the ordinary way, would be a breach of duty to his client, he will be liable to the client accordingly.

The question, therefore, is : Was the admission of negligence one which, in the circumstances, the insurers were entitled, under the policy, to require the insured to make ? In my opinion, clearly not. The right given to the insurers is to have control of proceedings in which they and the insured have a common interest—the insured because he is the defendant and the insurers because they are contractually bound to indemnify him. Each is interested in seeing that any judgment to be recovered against the insured shall be for as small a sum as possible. It is the insured upon whom the burden of the judgment will fall if the insurers are insolvent. The effect of the provisions in question is, I think, to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they *bona fide* consider to be the common interest of themselves and their

insured. However, the insurers are, in my opinion, clearly not entitled to allow their judgment as to the best tactics to pursue to be influenced by the desire to obtain for themselves some advantage altogether outside the litigation in question, with which the insured has no concern. This is what was done in the present case. I do not wish to use hard words, but
A I should have thought that a moment's consideration would have shown that the course adopted was as unjustified in point of law as it is assuredly repellent to the sense of business decency. I am not surprised that the jury should have wished to express their emphatic disapproval.

It was suggested that the respondent was precluded from maintaining
B this cause of action, on the ground that he ought to have complained to the appellants at the time. There is nothing in this. The respondent complained to the insurers, and, even if it be assumed that he was under a duty to complain, this was clearly sufficient. The insurers took no notice of the complaint, and it is not to be supposed, in the circum-
C stances, that the appellants would have acted otherwise than they did, even if the complaint had been passed on to them.

I now turn to the question of damages. In my opinion, the £1,132 12*s.* 10*d.* is clearly irrecoverable. It is true that the respondent had a judgment recovered against him whereby he became liable to pay
D this amount, but that liability was at once discharged by the Farmers Union, and I am quite unable to see how it can be said that he suffered any but nominal damage in this regard. It is said that the circumstances that he was insured against the liability on which the judgment was based and that the insurers duly paid are irrelevant. This appears to
E me to be a fallacious argument. The claim in this action is not a claim in respect of a risk covered by the policy. It is a claim against solicitors for negligence, and the question is what damage the respondent has suffered as the result of such negligence.

The only other specific matters in respect of which pecuniary loss was
F alleged were in relation to the no-claim bonus, and the possibility that other insurers might have declined to insure the respondent, or might have demanded a higher premium. However, the no-claim bonus was in fact allowed, and upon the other matter there was no evidence of damage.

G It was said that, as the result of the negligence on the part of the appellants, the respondent was subjected to mental suffering, that he was held up to public disapproval, that his reputation as a careful driver was destroyed, and that the jury were entitled to award damages in respect of these matters. It was said that the action was an action
H in tort, and not in contract, and that, even if it were an action in contract, such damages were recoverable. In my opinion, the cause of action is in contract, and not in tort. The duty of the appellants was to conduct the case properly on behalf of the respondent as their client, subject to any proper exercise by the insurers of the right of control conferred upon them by the policy. The relationship of solicitor and client is a

contractual one: *Davies* v. *Lock* (1) and *Bean* v. *Wade* (2). It was by virtue of that relationship that the duty arose, and it had no existence apart from that relationship.

No authority was cited to us which supports the proposition that, in an action based on breach of contract, damages can be recovered in respect of the matters to which I have referred. No pecuniary loss arose from them, and no reasonable probability of pecuniary loss in the future could be shown. The suggestion that in some future proceedings in relation to a motor car accident the respondent might be placed at some disadvantage by having these admissions on record is, in my judgment, too remote and fanciful to support an award of damages. Reliance was placed on *Wilson* v. *United Counties Bank, Ltd.* (3). In that case, bankers, who had been entrusted with the supervision of a trader's business, by their negligence caused his bankruptcy. In addition to damages for the loss occasioned to the bankrupt's estate, the jury awarded £7,500 damages for the injury to his credit and reputation, and it was held by the House of Lords that this award was good. The decision rested upon the special terms of the contract, under which the bank "agreed to take all reasonable steps to maintain the plaintiff's credit and reputation." Lord Birkenhead, L.C., put the case in the same class as that of the case where a banker dishonours a cheque although the customer's account is in funds. In such cases, it is the commercial credit of the customer that is injured, and the inference arises that pecuniary loss will necessarily ensue. In the present case, the injury to the respondent's reputation was not of this character.

Quite apart from the circumstances of the present case, I should have been glad if I could have found the law to be different from what I conceived it to be. Professional men such as solicitors and doctors are in a position where a breach of duty may often lead to mental suffering and social discredit without any real pecuniary damage. In some cases, the client may, on the facts, have some other cause of action—for example, defamation. If, however, his sole cause of action depends on breach of contract, it is unfortunate if the damages recoverable in such circumstances are only nominal. Nevertheless, in the absence of authority, I am not prepared to hold otherwise than that the £1,000 awarded under this head must be reduced to 40*s*.

The question of libel can be dealt with more shortly. At the trial no submission was made that the letter of Mar. 26, 1935, was not capable of a defamatory meaning, but, when argument took place upon the findings of the jury, the judge allowed the point to be taken, and ruled against it. The jury had found that the words were defamatory in their ordinary meaning, that they bore the meaning alleged in the innuendo, and that they were defamatory in that sense. The substance of the innuendo was that the respondent had been guilty of the negligence alleged, and that the appellants had instructions to make the admissions on his behalf. In my opinion, the ruling of the judge was clearly right,

and the findings of the jury must stand. The main argument on behalf of the appellants was directed to the question of malice, or indirect motive, which the jury found to have existed. The judge ruled, and it was assumed on both sides in the court below and before us, that the occasion was a privileged one. I am content to proceed upon that basis,
A but it must not be thought from this that I assent to the proposition that a solicitor who, in breach of his duty to his client, writes a letter in the course of litigation to the solicitor on the other side, containing matter defamatory of his own client, in the truth of which he does not believe, can assert against that client that the occasion was a privileged
B one. Assuming, however, that the occasion was privileged, the question arises as to whether there was evidence to support the finding of the jury that the appellants were guilty of malice or indirect motive. In my opinion, there was ample evidence. Once the innuendo was held to be proved, it followed that the statements in the letter were untrue,
C and that they were untrue to the knowledge of the appellants. Moreover, the statements were made in the course, and for the purpose, of carrying into effect the scheme which had been concocted by the appellants and the solicitors to the Motor Union, whereby the interests of the respondent were being sacrificed for the purpose of securing an improper advantage
D to the Farmers Union. In these circumstances, it appears to me to be idle to say that malice or indirect motive did not exist.

There was a faint suggestion that the judge, in summing up on the question of libel, had misdirected the jury. I asked Sir William Jowitt to point to any passage of which he complained, and the only passage
E to which he referred was one where the judge, in dealing with the question of malice, said : "The question here is, did they believe in the truth of it when they said he had been guilty of negligence ?" It was said that this was a direction to the jury that this was the meaning of the words. I do not think that, in the context, any exception can be taken to this
F language. The judge had dealt with the question of the meaning of the words, and the question of malice would arise only if the jury found the words to be defamatory—that is, in substance, that they meant that the respondent had been guilty of negligence. The suggestion that the jury could have been misled appears to me to have no foundation.

G The only remaining question under this head is that of damages. The jury awarded £1,000, and it is said that this sum is so excessive as to justify us in directing a new trial. I cannot take this view. It is true that the only publication was to Aubrey Groom's solicitors. Nevertheless, the jury were entitled to have regard to all the circumstances,
H and to award punitive damages if they thought fit. The judge pointed this out to the jury in the following words :

> You can even give damages for punishment, though why you should punish in this particular case—I mean as to this particular letter written to a brother solicitor —I do not know.

No complaint was made of this direction, and I am unable to say that the sum awarded is so unreasonable as to justify us, in accordance with well-known and recognised principles, in directing a new trial.

In the result, the verdict of the jury awarding £1,000 damages for breach of duty must be set aside, and the judgment under appeal must be varied by substituting for the sum of £3,132 12*s*. 10*d*. the sum of £1,002, being as to 40*s*. damages for breach of duty, and as to £1,000, the amount of the award of the jury on the issue of libel.

Scott, L.J.: This appeal raises, directly and indirectly, more than one question of general public importance in connection with the working of the system of compulsory insurance of all motor vehicles against third-party liabilities which has resulted from the Road Traffic Act, 1930. The legal decision of the chief issues of liability depends upon the correct interpretation of a single sentence contained in Condition No. 2 of the respondent's policy of insurance, which is as follows:

> The society shall, if and so long as it so desires, have absolute conduct and control of all or any proceedings, against the insured (including arbitration and negotiations).

Although the Act compels insurance by making failure to do so a criminal offence, and imposes certain particular conditions in the policy, it purports in other respects to leave the parties free to make their own bargain. In practice, however, the individual motorist enjoys no such freedom. To whatever insurance company he goes, he has to accept its printed policy. The companies all act in unison, and all insist on the condition of absolute control over the insured's defence. The individual thus has no choice, and, for practical purposes, the Act has compelled the public to accept that condition. In this respect, motor insurance has passed from contract to status. Whether it is desirable that the position should be left as it is, or whether it would be better for Parliament to recognise the powerlessness of the individual, frame a policy which it considers fair, and schedule it to an amending Act, is not a question of law with which we are concerned. I mention it in order to indicate how limited is the question of law which we have to decide.

The incident which started the train of events leading up to the action and claims now before us was a daylight collision, at the junction of a lane with a major road in the eastern counties, between the respondent's car, driven by himself, with his brother Aubrey as a passenger, along the major road, and a motor lorry, owned by a firm called Tear Brothers, which came out of the lane. The policy covering, *inter alia*, third-party liabilities was issued by the National Farmers Union Mutual Insurance Society, Ltd. (whom I shall call "the society"), under date of July 21, 1934.

The action in which the judgment under appeal was given was not an action in which the issues of responsibility for the collision were tried, but an entirely separate and subsequent action, founded upon what had been done by the society, and by their regular solicitors, the firm of which Mr. William Charles Crocker is the senior partner, the present appellants (whom I shall call "Crockers"), in relation to the respondent's defence in the collision action. That action had been brought by his brother Aubrey against Tear Brothers, and also against the respondent himself, both being made defendants. In the present action, for reasons which I will explain in a moment, the respondent was claiming damages for breach of contract and duty, and also for libel from Crockers, who had been instructed by the society to act as his solicitors in the collision action, and also from the society itself for breach of contract and duty and for libel.

The action was tried before HAWKE, J., and a common jury. The claim for libel against the society the judge withdrew from the jury. They found in favour of the plaintiff against both Crockers and the society on all the questions left to them. Judgment was entered for the plaintiff against Crockers on three heads, with which I will deal presently, but in favour of the society, by reason of an arbitration clause in the policy, which made a preliminary arbitration a condition precedent to any legal proceedings. There is consequently no appeal by the society, and, as there is no cross-appeal by the plaintiff on the arbitration clause, it follows that no question between the plaintiff and the society is directly in issue before us. Indirectly, however, important questions of the relations between the respondent as insured and the appellants as insurers do arise, and must be determined, for the reason that in their defence the appellants justify their conduct, of which the respondent complained in his statement of claim, and in respect of which he obtained a verdict and judgment against them, on the ground that it was in compliance with, or covered by, instructions given to them by the society, and that the terms of the policy authorised the society to give those instructions, and compelled them, as the society's solicitors, to obey them, whether conveyed expressly or merely by implication, because the policy, properly construed, so defined their duty as solicitors to the society. None the less, it is, in my view, essential to examine the facts of the case somewhat closely, in order to see how the questions of interpretation arise, and to appreciate what they are. The clearest way of doing so is, I think, to take them historically. SIR WILFRID GREENE, M.R., has cited the two material clauses of the policy, and I need not repeat them.

The collision took place on Aug. 11, 1934, in broad daylight. The respondent's car was very badly damaged, and the respondent, who was driving, received concussion, so that afterwards he remembered nothing of the facts connected with the collision itself, and he was also somewhat injured. His brother Aubrey, a principal assistant in the Bank of England, who was sitting by him, was very seriously hurt, the base of his skull being fractured and other injuries being caused.

For the purpose of understanding the position of the various parties during the sequence of events which led to the present litigation, we may, I think (for reasons which will appear as I go through the story), assume as a basic inference of fact that everybody concerned at all material times realised that the plaintiff was free from blame for the collision. I think we should deal with the appeal upon that footing, looking upon the negligence of Tear Brothers as the sole cause of the collision. The correspondence makes it clear beyond a doubt that both the society and Crockers realised that fact from the very first moment when they respectively considered the circumstances of the case, the former through their A Spalding manager on Aug. 25, 1934, the latter from the moment when they perused the file of documents sent them by the society and wrote back, on Feb. 25, 1935, expressing their opinion to that effect.

At the trial below of the present action, the issues of negligence and contributory negligence in regard to the collision were raised again by B the appellants, and evidence about the collision was called on either side. However, it is, I think, clear, from the summing up and the answers of the jury, that the latter were satisfied that the negligence of Tear Brothers was the sole cause of the collision. Indeed, the photographs put in evidence, which had been taken at the time by a partner in Tear C Brothers, who happened to be following a short distance behind the lorry which was in collision, were almost sufficient of themselves to convince the jury. The total freedom from blame of the respondent must therefore, I think, be taken to have been found as a fact by the jury. D

I must now go back a little. On Aug. 17, the insurers of Tear Brothers, the Motor Union Insurance Co., Ltd., wrote in that capacity to the respondent the usual letter after a collision, offering inspection of Tear Brothers' lorry, and asking the name of his insurers. On Aug. 21, Metcalfe & Co., solicitors, wrote to the respondent that they had been instructed by E his brother Aubrey. On Aug. 25, the society wrote to Metcalfe & Co. pointing out that there was "obviously no negligence on the part of Mr. William Groom." On Sept. 12, Mr. Crust, solicitor, wrote to the Motor Union that a claim would be made by the respondent for personal injuries against Tear Brothers. A day or two later the driver of the F lorry was convicted at Wisbech and fined £5 for driving to the danger of the public, and his licence was suspended for 12 months.

The society paid the respondent direct for the damage to his car, but for his personal injuries he had to claim against Tear Brothers. After an unsuccessful attempt to obtain a settlement out of the Motor G Union, Mr. Crust issued a writ against them. To that action the Motor Union caused a defence to be put in, denying liability and alleging that the collision was caused by the respondent's negligence, but they paid into court (with denial) the sum of £100. This the respondent subsequently took out. H

In the meantime, behind the scenes, and without informing the respondent, the two insurance companies had in Dec., 1934, been putting their heads together in a plan for reducing their total pecuniary liability, arising, not only out of the collision between the respondent's car and Tear Brothers' lorry, but also out of another collision altogether, with which the respondent had no concern whatever. This was done because of a " knock for knock " agreement to which the two companies were party. I have often heard of, but never seen, a " knock for knock " agreement. The sooner one comes before the courts the better. Both companies knew that the respondent was not liable for the collision. As early as Aug. 25, Mr. Gethin, the manager of the society's Spalding branch, with whom the respondent had effected his insurance, wrote to Metcalfe & Co., the solicitors acting for Aubrey Groom, and said so categorically. There can be no doubt that the Motor Union were under no delusion on that head. Both companies knew that there was no real risk of his being held to blame. However, Tear Brothers' driver had been found criminally negligent, and Aubrey Groom had been very seriously, and perhaps permanently, injured. This looked like a heavy verdict against Tear Brothers. The Motor Union thereupon evolved a proposal which I imagine they thought out in this way: " If we can induce William Groom's insurers to make a fifty-fifty bargain with us, it will not matter to them whether William Groom is hit or not. Having got them to make that agreement, we will then ask them to file a defence for William Groom admitting the negligence alleged against him, whilst we, for Tear Brothers, will put in a defence denying negligence and alleging that the collision was solely caused by the negligence of William Groom. We can then, perhaps, tempt Aubrey's solicitors, by the bait of avoiding costs on the issue of liability, to discontinue against Tear Brothers, and go to trial on the sole issue of the amount of damages, and against William Groom only. For obvious reasons, this will be good tactics, and help to induce the jury to award much less damage than would be the case if Tear Brothers, who were so grossly negligent, and whose driver had been convicted, were defendants." The above imaginary soliloquy I believe expresses their reasoning, and I think that it is a fair statement of their plan to be inferred from the evidence. The society knew, however, that their insured was practically certain to get judgment, and it was obvious to the Motor Union that they would want a fairly substantial *solatium* to make them willing to enter into the agreement. This the Motor Union achieved by offering to bring into the fifty-fifty pool another case altogether, one in which the society was interested, but with which the respondent had no connection whatever. They chose one with which the head office of the society, and not either the Spalding local branch or the Norwich district branch, were concerned. In that case, too, the claimant was a passenger, but otherwise the respective positions of themselves and the society were just reversed, the society's assured being the guilty party, the Motor Union's assured being the blameless driver of the car in which the passenger was seated. The society's head office evidently expected the lady passenger in that case to get heavy damages against their assured—possibly a higher figure than the Motor Union expected. Anyhow, they came to the conclusion that the deal would be very profitable to them pecuniarily. Accordingly, the society's head office decided to accept the Motor Union's offer. Their Norwich branch, who were handling the respondent's case, when the fifty-fifty proposal was first made to them by the Motor Union, had refused it, on the express ground that they "considered the accident was entirely due to the negligent driving of the third-party vehicle," and reported the proposal to the head office only when it was renewed with the additional A attraction of the head office's case being brought into the fifty-fifty pool: see their letter to the head office of Dec. 18, 1934, asking for instructions. On Dec. 20, the head office replied ordering them to agree, and added these comments:

> B For your information the passenger in this second case, a girl aged 22, who was riding in the insured's car; she has a serious and permanent disfigurement and the claim is likely to cost something between £700 and £800; our insured has no defence. We think therefore we must take a broad view of both cases, especially as in so doing it will seem that we shall be in pocket to the extent of several hundred pounds.

The Spalding manager, who perhaps knew more about the facts than C anybody did, from first to last protested, pointing out the complete freedom from blame of the society's insured.

Pursuant to the orders of the head office, the Norwich branch duly made the agreement with the Motor Union, and at once got into touch with the society's standing solicitors, the present appellants. As soon D as the pooling agreement was made, and before any writ had been issued against Tear Brothers by either William or Aubrey Groom, the Motor Union also wrote to the appellants—in what capacity they supposed the appellants to be acting does not appear—informing them of the agreement, and on Dec. 28 wrote to the society that they had done so. The two E insurance companies without delay started to perform their agreement by putting their plan into operation. Early in 1935, the Motor Union caused Tear Brothers' solicitors to put in a defence to the respondent's action, denying negligence and alleging that his negligence had caused or contributed to the collision. They also informed Aubrey Groom's F solicitors, Metcalfe & Co., who had not yet issued Aubrey's writ, that that defence would be set up, no doubt in order to put pressure on them to make William Groom a defendant in Aubrey Groom's intended action.

On Feb. 8, 1935, Metcalfe & Co., as solicitors for Aubrey Groom, wrote to Mr. Crust, as William Groom's solicitor, that the Motor Union were G alleging negligence against William Groom, and that they (Metcalfe & Co.) would have to join him as defendant with Tear Brothers. Mr. Crust replied suitably on Feb. 9 and sent copies of both letters to William Groom, telling him to forward them to his insurance company, and he accordingly left them at the society's Spalding branch: see the acknow- H ledgment of Feb. 13. In the meantime, on Feb. 12, Metcalfe & Co. had issued the writ for Aubrey Groom against Tear Brothers and William Groom. On Feb. 19, he called again with the writ in Aubrey's action. He saw Mr. Gethin, the Spalding manager, and it is plain from the latter's letter of Feb. 20 to the Norwich office that the respondent is, or at any rate was then, wholly ignorant of legal matters. The letter speaks for itself. Mr. Gethin asked Norwich to instruct a solicitor to enter appearance for him at once.

Had Aubrey's action been fought out, with denials by each defendant, and counter-charges of the other's liability, presumably William Groom would have got off scot-free, and Tear Brothers would have been hit in suitable damages, and ordered to pay William's costs as well as the plaintiff's. However, this result would not have been in accordance with the plans of the two insurance companies for which they had made their pooling agreement.

On Feb. 21, 1935, the society instructed their own solicitors, the present appellants, to enter appearance for the respondent, sent them the file of papers, and asked them to report. On Feb. 25, 1935, Mr. Wood, a partner in the appellant firm, duly reported, and expressed the opinion that there was "little doubt Tear Brothers would be held solely liable for the accident," but pointed out that the fifty-fifty agreement was inconsistent with thus fighting the case. On Mar. 1, the society wrote to the appellants confirming the fact of the pooling agreement with the Motor Union. On Mar. 7, the Norwich office of the society wrote to the branch office at Spalding a letter containing the following important statements about the pooling agreement:

> With regard to our paying half of Mr. A. C. Groom's special damages, we perhaps should explain the position to you more fully, because although we do not consider for one minute that there was any negligence on the part of our insured, we have arranged with the third party's insurance co. to settle the matter on a fifty-fifty basis, on condition that they act in a similar way with a case through head office where the position is more or less reversed. Actually we think this is more satisfactory from our point of view as there is a much larger amount in the case with which head office are dealing.

On Mar. 11, the appellants wrote to Tear Brothers' solicitors:

> We have your letter of the 7th inst. together with enclosure and we confirm that our clients [the society] have given us instructions to inform you that they are prepared to share a settlement with your clients of whatever sum be paid to the plaintiff by way of damages and costs.

On Mar. 19, there was a note by one Clements, a clerk in the appellants' office:

> Attending Messrs. Ponsford & Devenish (solicitors to Tear Brothers) at the telephone when it was arranged that they would deliver a defence denying negligence and we deliver defence admitting negligence and that our client advises as to what sum should be paid in settlement.

On the same day, the appellants reported this arrangement by letter to Norwich. On Mar. 25, instructions were sent by Clements to counsel, consisting of a bare indorsement on the back sheet:

> Instructions to counsel to settle defence admitting negligence and advise as to what sum should be paid in settlement.

On Mar. 26, a defence was delivered for Mr. Groom saying:

> The defendant for the purpose of this action and not otherwise admits that he was guilty of the negligence set out against him in the statement of claim.

On Mar. 27, the appellants wrote to the society, enclosing counsel's opinion on the amount to be paid into court, and copies of the above defence of the respondent. The letter contained this paragraph :

> We arranged with the co-defendants' solicitors that they should deliver a defence denying negligence and we deliver a defence admitting negligence but denying damages and this we have done.

A

On the next day, Tear Brothers' solicitors wrote to Metcalfe & Co. a letter which contained this paragraph :

> No doubt you will be serving us with notice of discontinuance and in that event you may take it that we shall not ask for any costs against your client.

B

A week later, Metcalfe & Co. acted on the suggestion, and duly served notice of discontinuance against Tear Brothers. The issue of damages was thus, in accordance with the arrangements of the two insurance companies, the only issue for trial.

The above extracts make it quite clear that no discretion was left to counsel in the matter of the defence. He was instructed to admit liability, C and the defence he drew was in accordance with his instructions.

By May 3, the respondent had heard of the notice of discontinuance against Tear Brothers, and had seen the defence put in (both through his solicitor, Mr. Crust), but neither the society nor the appellants had ever communicated with him in regard to anything whatever relating to the D action or his so-called defence. On that day, he called on the society's Spalding manager and complained bitterly at having been made a defendant. What actually passed at the interview is not very clear, but I do not think it matters, as I see no ground for inferring that his rights were compromised thereby. Mr. Gethin's letter of that date to E the Norwich branch summed up the matter in this passage :

> Mr. Groom is very cross that without his consent negligence should be admitted, when in fact no one seriously suggests that he was negligent. His view is that if his brother's action against him goes to court, say in order to have the amount of the damages determined, this admission will be mentioned and he will be held up to the world as a man who has admitted negligent driving. F

The next thing of importance which happened was the trial of Aubrey's claim for damages. It took place on Nov. 24, 1935, and resulted in a judgment for £924 damages and costs subsequently taxed at £208 12*s.* 10*d.* The respondent had left everything to his insurers after his complaint G of May 3, and knew nothing further until just after the trial, when a friend showed him an account of it in a local newspaper, in which it was stated—quite correctly—that judgment had been given against him for £924 for negligent driving, the plaintiff having discontinued against Tear Brothers. He was greatly disturbed in mind, and called on H the society's Spalding manager and expostulated at the injurious effect it would have on his reputation as a careful driver, when all the time he had been wholly free from blame. He at once consulted Metcalfe & Co., who had acted for Aubrey, and, on Nov. 6, they wrote both to the appellants and to the Spalding branch of the society. On Nov. 9, the appellants wrote a letter to the Norwich branch referring to Metcalfe & Co.'s letter and containing these words:

> The reason we did not communicate with Mr. Groom was that by arrangement with the Motor Union you agreed to share the claim on a fifty-fifty basis, and negligence being admitted we did not require the assistance of the insured. We shall be glad if you will kindly confirm that the policy issued to Mr. Groom gives you the sole right to take over the conduct of the proceedings and we shall be glad to hear any comments you have to make and to receive your instructions to reply to Messrs. Metcalfe's letter.

The appellants waited till Dec. 4, and then replied that under the policy the society had absolute control of the proceedings, and that they had acted upon the society's instructions, the society being their client.

The respondent was not yet, however, in a position to bring his action. The appellants had possession of all the papers, and refused—presumably by arrangement with the society—to give them up to Metcalfe & Co., or even to allow inspection, relying on their contention that the relationship of solicitor and client had not existed between them and the respondent, but only between them and the society. This attitude of the appellants' caused considerable delay. Finally, Metcalfe & Co., on Mar. 24, 1936, took out an originating summons in the Chancery Division, and under it CLAUSON, J., held that the appellants, though nominated by the society under Condition No. 2 of the policy, when nominated, had become solicitors to the respondent. In any event, the effect of that judgment would be *res judicata* between the respondent and the appellant in the present litigation; but I agree entirely with the statement of the law in the judgment of CLAUSON, J.

It remains to consider the pleadings as between the respondent and the appellants. There are nominally three, but in substance only two, causes of action alleged in the statement of claim. The first is damages for breach of duty to the respondent, as his solicitors, expressed alternatively in contract or in tort. That covers two heads of claim: (*a*) the general damages, which the jury assessed at £1,000, and (*b*) the specific liability of £1,132 12*s.* 10*d.* incurred by the respondent to his brother in the collision on account of judgment debt and costs, as a result of the admission of his negligence contained in the so-called defence which the appellants put in. The second is in tort for libel.

I will deal first with the breach of duty, postponing for the moment the question of libel. The statement of claim is a long document, but, as against the appellants, the main allegations of law and facts are these:

> (1) Express terms of the policy—viz., (*a*) that the society agreed to indemnify the plaintiff against all sums including claimant's costs and expenses which the plaintiff might become legally liable to pay in the event of injury caused by or through or in connection with any motor car described in the schedule thereto in respect of accidental bodily injury to any person other than a person engaged in or upon the service of the insured; (*b*) (i) that the insurance company would allow the plaintiff a no-claim rebate of 20 per cent; (ii) that on the happening of any event giving rise or likely to give rise to a claim thereunder coming to the knowledge of the plaintiff or his representatives the plaintiff or the representatives would forthwith notify the society; (iii) that the plaintiff would not incur any expense whether in respect of litigation or otherwise or make any payment settlement arrangement or admission of liability for which the insurance co. might be held

> liable thereunder without the written authority of the insurance co. . . . and that the insurance co. should, if and so long as it so desired, have absolute conduct and control of all or any proceedings against the plaintiff.
>
> (2) An implied term—viz., that in exercising such conduct and/or control of any such proceedings the insurance co. would do so as the agent of the plaintiff and with due regard to his interests. Further or alternatively, in the premises it was the duty of the insurance co. so to act.
>
> (3) That the collision was caused solely by the negligence of Tear Brothers.
>
> (4) That Aubrey issued his writ and that the respondent took it to the society.
>
> (5) That knowing the above facts the society put the respondent's case in the hands of the appellants as solicitors for the respondent.
>
> (6) That it then became the contractual duty of the appellants as such solicitors for the respondent to conduct his defence to the said action with due regard to his interests and if any conflict of interest arose between the plaintiff and the insurance co. to advise the plaintiff thereof.
>
> (7) That negligently and in breach of contract and duty to the plaintiff, up to Mar. 27, 1935, both the insurance co. and the appellants failed to obtain any instructions from the plaintiff, or to inform him that any conflict of interest between the plaintiff and themselves as his agents had arisen or might arise.
>
> (8) That "the appellants, although they knew as aforesaid that the plaintiff had a good defence to the said action . . . on Mar. 25, 1935, without any instructions or authority so to do, delivered a defence as solicitors for the plaintiff wherein the plaintiff was made to admit that the said collision had occurred solely by reason of the negligence alleged against him in the statement of claim."

As a head of damage, the respondent claimed the injury to his reputation as a driver.

It will be observed that the statement of claim is framed without any reference to the fact that the society decided to act as they did for a reason alien to the policy. That fact is not pleaded as a breach of the insurance contract which invalidated the society's exclusive control over the conduct of the defence. The defence followed the lines of the appellants' letter of Dec. 4, and avoided any admission that they had been the respondent's solicitors, their carefully chosen words being that:

> they acted as solicitors in the conduct of the plaintiff's defence, and so acted on the instructions of the insurance company under the condition in the policy.

They further alleged that, by reason of the terms of the policy, they had through the insurance company the respondent's instructions and authority to put in the defence they did put in. They also pleaded that the respondent was estopped from complaining by his failure to interfere on or after May 3, 1935. This defence was not, I think, argued before us, and I regard it as misconceived.

The judge in his summing up followed the statement of claim, and made no reference to what seems to me the vital point of the case—namely, the decision of the society to conduct the respondent's defence by reference to the secret bargain with the Motor Union. But for the fact of that bargain, which, from the point of view of the respondent's rights, was so improper as to be in effect corrupt, there might have been more difficulty than there is in dismissing the appeal on the first issue of liability.

The position in regard to the claim in libel is simple. It was based upon a letter of Mar. 26, 1935, written by the appellants as solicitors on the record for the respondent as defendant in Aubrey Groom's action to Metcalfe & Co., the solicitors for the plaintiff. The latter had suggested that the two sides should agree a plan of the place of collision for the trial. The appellants replied as follows:

> We have your letter of the 25th inst. and we enclose herewith our client's [the plaintiff's] defence service of which kindly accept by post and from which you will observe [he] admits that he was negligent on the occasion referred to in the A statement of claim and therefore there will be no necessity for you to produce a plan.

The judge held that it was capable of a defamatory meaning, but that the occasion was privileged, and he therefore left the question of malice to the jury.

B The specific questions to, and answers by, the jury have already been quoted by SIR WILFRID GREENE, M.R. I will deal first with the claims in contract or tort, arising out of the legal position created by the policy of insurance and the facts I have narrated, apart from the libel issues. Mr. Pritt argued, for the respondent, that he had a cause of action in C tort for breach of duty. I do not think so. A solicitor, as a professional man, is employed by a client just as much as is a doctor, or an architect, or a stockbroker, and the mutual rights and duties of the two are regulated entirely by the contract of employment. The cases of *Bean* v. *Wade* (2) and *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* (4), cited to us, D both recognise this basic principle. The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including E in particular the duty of the solicitor to protect the client's interest, and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep F the client informed to such an extent as may be reasonably necessary according to the same criteria. In all these aspects, however, the tie between the two is contractual. There is to-day no common law duty similar to that which survives in the case of a bailee or carrier, and no cause of action lies in tort for the breach of the above duties, unless, G of course, particular circumstances disclose such a cause—fraud, for instance.

It is plain that the appellants could not have escaped liability upon the respondent's general claim for breach of contractual duty if they had not been able to rely on the society's instructions under the policy; H and the validity of that defence necessarily depends upon the true measure of the society's right under the policy to give instructions. In considering that question in the present case, these facts must be kept in mind: (i) everybody was satisfied (*a*) that the respondent had not been negligent, and (*b*) that there was no risk of his being hit if the issue of liability was tried; (ii) the society knew before the so-called defence was put in that he insisted strenuously on his freedom from blame, and resented the idea of being made a defendant ; (iii) he was throughout kept in the dark, and in fact wholly disregarded.

Under Condition No. 2, the society were given, in consideration of their indemnity, an absolute right to control their insured's defence. The scope of this right was, however, in my view, subject to certain implied boundaries and limitations. It was not one which they would be entitled to exercise arbitrarily. They were bound to exercise a real discretion upon each question as it arose in the conduct of the defence, making each decision after due consideration of the circumstances of the particular case, not, of course, consulting the wishes of the insured as if he were an uninsured person, but taking their decisions with their minds on the facts of the particular allegations made against him, whilst not forgetting their own rights arising from the bargain expressed in the policy—namely, that, in return for his indemnity, their insured allowed them freedom to deal with the pecuniary risk to which they were exposed as economically for themselves as they could, without bringing into the account extraneous considerations wholly foreign to the subject-matter of the insurance between him and them. It is easy to see, even within a field of discretion so defined, that a great sense of moral grievance might still be caused to an insured, as, indeed, the judge felt. Let me take the case of either a private chauffeur, or a lorry driver engaged continually in commercial transport on the roads, in either case a man of unblemished road-reputation. The insurance company settles the case without consulting the employer. His driver knows he was guilty of no negligence, and the employer knows it, too. The driver feels that his good reputation has been sacrificed. Very hard cases happen in this way sometimes. It is, however, not necessary for this appeal to express any opinion on the difficult question of whether or not, on such facts, the insured would have legal ground for complaint, for the facts of the present case do not leave room for doubt. They fall wholly outside the field of discretion entrusted to the society by Condition No. 2. The society here, in making their profitable bargain with the Motor Union, were acting as much outside that discretion as they would have been if they had accepted a bribe from a stranger in consideration of their instructing the appellants to put upon the record in Aubrey's action an admission of the respondent's negligence. The inclusion of the other action in which the respondent had no interest whatever, as a circumstance material to the exercise of their discretion, of itself imported a failure to exercise the discretion which, by the contract, they had undertaken to exercise, and was therefore a breach of their contract, and that initial breach invalidated the whole of their consequent instructions to the appellants. The policy conferred upon them no right to call upon the appellants to act on their mandate, and the appellants derived no authority from it to do what they did. The consequences are plain. The appellants were acting from first to last in breach of their contractual duty to the

respondent. First, they were repudiating the very existence of the relationship of solicitor and client between themselves and the respondent which was constituted by the nomination of the society. Secondly, they were acting on orders which the society had no right to give, and taking action with which they knew their client did not agree. Thirdly,
A they did not inform him, or consult with him, or give him an opportunity to challenge the right of the society to give the instructions they had given, or, if need be, to intervene, and conduct the defence of the case himself, at his own expense.

It follows, in my opinion, that the respondent is entitled to hold his
B judgment on his first cause of action, so far as the issue of liability for breach of contract is concerned. As regards the £1,000 damages for which he got judgment, however, I feel bound to differ from the judge. I do not think that there was any evidence of pecuniary loss such as might be recoverable as special damage for breach of contract; and
C against general damages for injury to his reputation or his feelings, *Addis* v. *Gramophone Co., Ltd.* (5) is, I think, a conclusive authority. The cases cited to us by Mr. Pritt do not, in my opinion, sustain his contentions that "general" damages are recoverable even in contract so as to put the amount at large for the jury to assess as in tort for
D defamation or negligence. In particular, the case of *Wilson* v. *United Counties Bank, Ltd.* (3), does not help him. In that case, the bank entered into an engagement to supervise a business, and failed to do so. The result was a direct pecuniary loss, which naturally was held to be recoverable. However serious to the respondent was the result of the
E very real breach of contract committed—and I have much sympathy with him—I think that the £1,000 must be reduced to 40*s.* as nominal damages, although I share the regret expressed by SIR WILFRID GREENE, M.R.

The second head of damages for the breach of contract stands on a
F different footing. It was contended for the respondent that, as the whole conduct of the defence by the appellants was from start to finish a breach of their contractual duty to him, it followed that, when judgment was entered against him for £924 damages and costs, and the costs were subsequently taxed at £208 12*s.* 10*d.*, it was the fault of the appellants
G that he was put under a liability to Aubrey, as plaintiff, of £1,132 12*s.* 10*d.*, and that, in respect of it, he was entitled to damages of that amount from the appellants. It is true that he did come under that liability, but it was not a liability which, as between himself and the society, he had to discharge out of his own pocket, and I think that the appellants
H are entitled to have that circumstance taken into account. Their breach of contract did not cause any actual loss to the respondent. The liability was nominal, because it was covered by the right of indemnity. Had the society become insolvent before payment, it would have brought upon the respondent a real loss. However, I do not think that the respondent can recover damages as for an actual loss when he in fact incurred no

expense. On this head, the appellants are entitled to have the judgment below reversed.

On the other hand, I think that the respondent is entitled to hold his judgment for £1,000 on the issue of libel. I agree with the judge that the letter was capable of a defamatory meaning, and, that being so, I can see no legal ground for attacking any of the answers of the jury, upon which the judgment was founded. The appellants were alive to the nature of, and reasons for, the society's bargain with the Motor Union, and knew that the society's instructions to them as to the conduct of the defence in Aubrey's action were dictated by that bargain. I assume, of course, that it had not occurred to the appellants that, in following this course, the society were acting outside the protection of their contract with the respondent. Nevertheless, the appellants' legal ignorance does not afford them a defence. They ought to have advised the society that the bargain was improper. For the reasons I have already given, they were conducting the respondent's defence, not only without his direct authority, but also without any authority derived from him through his delegation of powers to the society, since *ex hypothesi* the action of the society lay wholly outside the sanction of the policy. These circumstances afford ample evidence to support the jury's finding of malice. In my opinion, they go further; they show that the judge was wrong in holding that the occasion was privileged. The privilege alleged was that the appellants, in writing the letter, were acting as the solicitors duly authorised to conduct the defence. If, however, as I have already held, they were not so authorised, the very foundation of the defence of privilege disappears. This consideration is an additional reason for affirming the judgment on the libel. In the result, I agree with the judgment proposed by Sir Wilfrid Greene, M.R.

MacKinnon, L.J.: I agree. I think that the second condition in the policy, which provides that "The society shall have absolute conduct and control of all or any proceedings against the insured," is subject to an implied term that the solicitor who is selected by the society shall act reasonably in the interests of both the insured and the society. As the insured is the litigant, the solicitor is his solicitor on the record, and owes him the duty of a solicitor to his client. Having regard to the circumstances, however, the solicitor also owes a duty to the society. I do not think that the insured can regard the solicitor as entirely his solicitor, to be instructed only by himself. For example, suppose there is a case merely of damage to two cars by a collision. Both cars happen to be insured by the society, which is liable to pay for the full damage to each of the two owners. It would be absurd in such a case for one owner to insist that the solicitor carry through a suit against the other owner merely in order that his *amour propre* may be gratified by a finding that he was not at fault for the collision.

The condition in terms provides, however, that the society shall have absolute control "if and so long as it so desires." In the case of such a demand by the insured, or in the case of any other conflict of interest or tactics between the insured and the society, the latter can say: "Very well. If that is the way in which you insist on your action being conducted, our solicitor shall no longer act for us. A You can instruct him, or any other, as your own solicitor." Thereafter, the litigation being ended, the insured will have to put forward his claim under part (ii) of the operative part of the policy for "all sums including claimant's costs and expenses which the insured shall become legally liable to pay in the event of injury or damage caused by" the B insured car. That part of the policy must also be subject to an implied term—namely, that the costs and expenses shall have been reasonably incurred by the insured. If, in the case I supposed, the insured had insisted on suing the other car-owner, and had lost his case, and had incurred costs, the society could refuse to indemnify him for them, C on the ground that such costs had been unnecessarily incurred by his own foolish conduct.

This means that the solicitor, nominated by the society, is the solicitor for the insured, who is his client. He is also, however, appointed by the society to protect its interests. If, in regard to any question of tactics D in conducting the litigation, the solicitor has reason to discern a conflict, or possible conflict, of interest between the society and the insured, it is the duty of the solicitor to inform the insured of the matter. If the insured then insists on a course that the society disapproves, they can refuse to conduct or control the proceedings any longer, and can leave E the insured to do so at his own cost, and at the risk, if the society are right in their view, of not being able to recover that cost under his policy. If people act reasonably, it is obvious that the business method contemplated by the policy can be carried out with perfect smoothness. When I recall that for at least a century almost every case about a ship, F both in the Admiralty and in the Commercial Court, has been conducted by solicitors nominated by underwriters or protection clubs, I am the more convinced that that is so.

In the present case, it is manifest to me that the defendant solicitors committed a breach of their duty to their client, the insured. Acting G solely in the interests, or supposed interests, of the society, they delivered a defence by which they made the insured admit that the collision was due to his negligence, when they knew perfectly well that it was not. Even if it was a matter of reasonable doubt whether or not he was at fault, I think that they ought to have informed the insured of the course H they proposed to take before taking it, so as to give him the opportunity, if he had chosen, to conduct the suit for himself on other lines. When, however, it was perfectly clear, as is now admitted, that he was not negligent at all, their conduct was quite indefensible. Their client was treated as a mere pawn in the game of the society and another insurance company.

So far, I agree with the result arrived at in the court below. However, judgment was given against the defendant solicitors for £3,132 12*s.* 10*d.* —namely, £1,132 12*s.* 10*d.* as the amount of the judgment recovered against the plaintiff by his brother, £1,000 damages for breach of duty or negligence, and £1,000 damages for libel. I am quite clear that this figure of £3,132 12*s.* 10*d.* must be reduced to £1,002, and no more.

First, as to the £1,132 12*s.* 10*d.* Judgment in the action *Groom* v. *Groom and Tear Brothers* was given on Nov. 1, 1935. For a very short time, the present plaintiff was nominally liable to have execution issued against him by his brother. Very soon, however, and long before the issue of the writ in the present action, on Oct. 7, 1936, the full amount of the judgment debt was paid to the brother by the insurance company. To recover this sum of £1,132 12*s.* 10*d.* in the present action, the plaintiff must allege either (i) that he has paid that sum, or (ii) that on Oct. 7, 1936, he was liable to pay it. Neither allegation can, however, be made.

Mr. Pritt relied on *Morley* v. *Moore* (6) as authority for the proposition that the plaintiff can in this case recover the £1,132, not for himself, but under some sort of duty to hand it back to the other defendants, the insurance society, who can hand it back to the defendant solicitors. *Morley* v. *Moore* (6) was obviously quite a different case. The plaintiff there had an interest of his own in the £5 of which he had been deprived by the ingenious tactics of the insurance company. Where, however, a plaintiff has no pecuniary interest at all in a cause of action, I cannot think that any court will allow him to litigate merely for the fun of litigation. If Mr. Pritt's contention were correct, this case would be possible. An owner of cargo has it damaged to the extent of £100. His underwriters pay him. The facts being beyond dispute, the underwriters apply to the ship's protection club and get the £100 back from them. Everything is thus squared up. Can the owner of the goods then sue the shipowner for £100, so that he can hand it to his underwriters, who can hand it to the protection club, and they hand it back to the shipowner ? If he did issue his writ in such circumstances, any court, on being informed of the facts, would stay the action as frivolous and an abuse of its process.

Next, as to the £1,000 damages for breach of duty. I am clear that this is a claim for damages for breach of contract, and that the plaintiff can recover only the pecuniary loss that he can show that he has suffered. He can prove no such loss in this case. Therefore, the damages must be reduced to 40*s.*

Mr. Pritt argued that the plaintiff suffered damage by loss of credit as a careful driver. He relied on *Wilson* v. *United Counties Bank, Ltd.* (3), where the plaintiff recovered for damages to his credit. " Credit " is an ambiguous word. In Wilson's case, it was " credit as a trader "—that is, a business asset that was lost or impaired. The damage was akin to the damage caused by the dishonour of a cheque, and a bank's breach of duty, by dishonouring a cheque, is one of the few and exceptional cases in which more than proved pecuniary loss can be recovered for a breach of contract. "Credit" as a careful driver (except possibly to a professional chauffeur) is not a business asset, but a social or personal distinction. The assertion that it has been impaired is more in the nature of a claim for defamation. Indeed, the judge, in that part of his summing up which dealt with the damages for breach of duty, treated the matter on this footing. He said:

> The first thing I want you to do is to tell me what sum of money you think will be a compensation to Mr. Groom for the position in which he has been put—namely, of being one who has confessed that he has negligently injured his brother . . . including the fact that people spoke to him.

Mr. Pritt also sought to suggest some elements of pecuniary damage in respect of (*a*) the respondent's loss of his no-claim bonus on renewing the policy, and (*b*) the possibility of his having to pay a higher premium, by reason of the defence entered in his brother's action, if he sought to insure with other underwriters. As to (*a*), in fact he did not lose the bonus. As to (*b*), there was no evidence of any practice with insurers of asking questions which would require him to inform them of the terms of the defence. I do not agree with Mr. Pritt's suggestion that, apart from any such question, the respondent would be under an obligation to volunteer the information as disclosure of a material fact.

Lastly, there is the £1,000 damages for libel. The pleadings in the action would, of course, be absolutely privileged. In their letter of Mar. 26, 1935, however, to the solicitors for the brother Groom, the defendants wrote:

> You will observe that he admits he was negligent on the occasion referred to.

I think that these words are capable of a defamatory meaning, and that therefore the question as to whether or not they were so in fact was rightly left to the jury.

I am very doubtful whether, in the circumstances, the letter was written on a privileged occasion, as Hawke, J., thought it was. If it was, however, I think that there was evidence to go to the jury on which they could find malice, as they did. Therefore, I think that the appellants cannot complain that damages for libel were awarded against them.

The appellants contend, however, that the £1,000 as damages for this libel was excessive, so that a new trial should be ordered. It is certainly a large sum. I can well imagine the other Mr. Groom saying to the plaintiff: "You have all the luck. I had my skull fractured, and I get only £900, but because someone said you fractured it you get £1,000. And it was only said to my solicitors, who would not believe it for a moment." In the course of some 12 years at *nisi prius*, I have been struck by the contrast between the frequent niggardliness of verdicts in cases of personal injury and the invariable profuseness in claims for defamation. A soiled reputation seems assured of more liberal assuagement than does a compound fracture.

In this court, however, the question for me is not whether or not I should have assessed these damages at a lower sum. The question is whether or not the amount is so extravagant that twelve reasonable men could not reasonably arrive at it. In all the circumstances of the case, which the jury were entitled to take into account, I cannot say that this verdict was in that sense an improper one so that we ought to set it aside and order a new trial.

In the result, I think that the appeal succeeds to this extent—namely, that the amount for which judgment was entered must be reduced from £3,132 12*s.* 10*d.* to £1,002.

Judgment varied by substituting for £3,132 12*s.* 10*d. the sum of* £1,002, *being as to* 40*s. damages for breach of duty, and as to* £1,000 *the amount of the award of the jury on the issue of libel. Leave to appeal to the House of Lords.*

Solicitors: *Linklaters & Paines* (for the appellants); *Metcalfe, Copeman & Pettefar* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

MASON *v.* BREWIS BROTHERS, LTD.

[King's Bench Division (Hawke, J.), **February 24, 25, 28, March 1, 2 April 1, 1938.**]

Libel—Letter written to labour exchange—Letter defamatory and malicious—Whether absolutely privileged—Unemployment Insurance Act, 1920 (*c.* 30), *s.* 11—*Unemployment Insurance Act*, 1935 (*c.* 8), *s.* 44.

The plaintiff brought an action for libel against his late employers in respect, *inter alia*, of a letter written by them to a labour exchange in response to a request from the labour exchange for certain information relating to the plaintiff. The jury found that the letter was defamatory, and written with malice. It was contended by the defendants that the question of malice was irrelevant, as the document was the subject of absolute privilege. In view of the decision in *Collins* v. *Henry Whiteway & Co.* (1), it was admitted that such a document would not have been absolutely privileged up to 1930, but it was submitted that the Unemployment Insurance Act, 1930, changed the law in this respect, such change being unaltered by the Unemployment Insurance Act, 1935, which consolidated the law:—

Held: such a communication was not absolutely privileged, the 1930 Act having made no change in the law in this respect.

[EDITORIAL NOTE. The position here is still covered by the decision in *Collins* v. *Henry Whiteway & Co.* (1), as it is decided that the alterations made by the statutes do not affect the point in question.

As to Absolute Privilege, see HALSBURY, Hailsham Edn., Vol. 20, pp. 461-466, paras. 563, 564; and for Cases, see DIGEST, Vol. 32, pp. 102-109, Nos. 1335-1413.]

Cases referred to:

(1) *Collins v. Whiteway (Henry) & Co.*, [1927] 2 K.B. 378; Digest Supp.; 96 L.J.K.B. 790; 137 L.T. 297.

(2) *Weed* v. *Ward* (1889), 40 Ch.D. 555; 2 Digest 613, *2440*; 58 L.J.Ch. 454; 60 L.T. 208.

(3) *Hurlbatt* v. *Barnett & Co.*, [1893] 1 Q.B. 77; 2 Digest 623, *2522*; 62 L.J.Q.B. 1; 67 L.T. 818.

(4) *Dawkins* v. *Rokeby* (*Lord*) (1873), L.R. 8 Q.B. 255; 32 Digest 102, *1339*; 42 L.J.Q.B. 63; 28 L.T. 134; *affd.* (1875), L.R. 7 H.L. 744.

(5) *Shell Co. of Australia, Ltd.* v. *Federal Comr. of Taxation*, [1931] A.C. 275; Digest Supp.; 100 L.J.P.C. 55; 144 L.T. 421.

(6) *Copartnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. 405; 32 Digest 104, *1347*; 88 L.J.K.B. 472; 118 L.T. 541.

A (7) *Notman* v. *Commercial Bank of Scotland* (1938), GLASGOW HERALD, Mar. 26.

(8) *O'Connor* v. *Waldron*, [1935] A.C. 76; Digest Supp.; 104 L.J.P.C. 21; 152 L.T. 289.

ACTION for libel tried before HAWKE, J., and a common jury. The defendants were the owners and the manager of a laundry, and had B employed the plaintiff as a van-driver. After the plaintiff had left their employment he applied to the local labour exchange for other employment. The labour exchange in the usual course applied to the defendants for certain information, whereupon the defendants, by their managing director, replied as follows:

C

> Herewith abstract from the Traffic Act Daily Records (Form No. 1) filled in by the claimant for the 12 weeks he was driving here: i.e., 114 days driving record. You will see that the claimant's statement is incorrect. On only seven occasions has he exceeded 90 miles on any one day and on only nine occasions has he exceeded 100 miles on any one day. These excesses we suggest are probably due to his forgetting calls and running over the same ground twice. In addition to this we have evidence that he was not properly filling in his rest periods, that is to say, D he was overbooking his hours worked. On only nine occasions does he show 12 hours, or over.
>
> In addition I may add that the claimant made no mention of this subject when giving in his notice. He stated his reason for giving in his notice was that he thought he would not be able to get on with the other drivers.
>
> This was owing to one of the other drivers having some money stolen in the dressing room, and the claimant stated that the other drivers suspected him of the theft. E This statement was made in the presence of the route supervisor who has been instructed to come along and give you any further information you may require.
>
> Prior to the time of leaving and after, the claimant's account connected with the collection of money from customers was found to be in a most unsatisfactory state.
>
> In fact, there are a number of customers who state they paid their laundry bill to the claimant although the cash has never been received by the company.

F At the trial, the jury found that this letter was defamatory, and that it was written with malice. The defendants argued that the document was absolutely privileged.

Rudolph Castle-Miller for the plaintiff.

Patrick A. Devlin for the defendants.

G *Devlin:* I have to satisfy the court that the tribunal to which this letter was written had to exercise judicial discretion, and not merely administrative functions. In *Collins* v. *Henry Whiteway & Co.* (1), it was decided that the Court of Referees was an administrative, and not a judicial, body, and that therefore communications to it were not H absolutely privileged. That decision was based on the Unemployment Insurance Act, 1920, under which an insurance officer was given power to determine claims. He was given absolute power to determine all claims, and, if a claimant was dissatisfied, he could appeal to the Court of Referees. There was no power in the Court of Referees to quash a decision of the insurance officer. They could only state reasons for disagreeing with his decision. The position is now regulated by the Unemployment Insurance Act, 1935, s. 44. The position has not been altered in substance, but only in form, but the question of whether a tribunal exercises its functions judicially or administratively is usually a matter of form. It is necessary to look at the function which a tribunal has to perform. The decision of the Board of Referees *now* may not be subject to appeal. That was not so under the 1920 Act. When interpreting a statute, one must look at the law as it was before the statute was passed. In this case, it is very difficult to find any reason for the legislature to have made this alteration in the law unless it was to get over the decision in *Collins* v. *Henry Whiteway & Co.* (1). To take a similar example, under the Common Law Procedure Act, 1854, s. 3, and the Judicature Act, 1873, ss. 56, 57, the court could order a matter to be referred to an official referee. In *Weed* v. *Ward* (2), it was held that this could be done only in certain circumstances. Then, owing to that decision, the Arbitration Act, 1889, gave wider powers of reference: see *Hurlbatt* v. *Barnett & Co.* (3). The presumption is that wider words in the later statute were put in intentionally. Parliament must be taken to have known the law, not only in the earlier statute, but also as laid down in *Collins* v. *Henry Whiteway & Co.* (1). [Counsel also referred to *Dawkins* v. *Rokeby* (*Lord*) (4), *Shell Co. of Australia, Ltd.* v. *Federal Comr. of Taxation* (5), and *Copartnership Farms* v. *Harvey-Smith* (6).] It is in the public interest that a man should be free to give an opinion to this tribunal.

Castle Miller: It is highly desirable that the rights of ordinary citizens should be respected. [Counsel referred to *Notman* v. *Commercial Bank of Scotland* (7) and *O'Connor* v. *Waldron* (8).] The change in legislation was merely one of administrative convenience, and the draftsman never had in mind the decision in *Collins* v. *Henry Whiteway & Co.* (1), which was on all fours with this case. Under neither Unemployment Act were the proceedings final, because there was always the umpire. [He was stopped by the court.]

Devlin, in reply.

Hawke, J.: I am very much obliged to counsel for the care with which they have looked into this matter. It arises out of a case in which the plaintiff was employed by a certain firm whose manager, named Mellon, is one of the defendants in this case. Circumstances arose in which he left the employment of his employers—I am using the word deliberately to avoid begging any question in the case—and then the question arose as to whether he could get other employment, and he went to the labour exchange about it. I accept, and Mr. Devlin does not dispute it, the fact that the labour exchange did stop the plaintiff's pay, and that he appealed or took steps to go to the Court of Referees. In the course of those proceedings, which may now ultimately lead, or might in 1920 have led, to the decision of an umpire whose judgment or decision or opinion would be final, the defendants were asked to give certain information to the labour exchange. This they did, in a letter written by Mr. Mellon. It is said that that letter was defamatory. The jury thought that it was, and that it was written with malice. It is not suggested to me that there was no evidence on which they might think so, but it is suggested to me that malice is an irrelevant topic altogether, because this case represents one of those matters in which the whole proceeding is judicial to such an extent that it is to the public advantage that everybody concerned shall be completely free to say what he likes, even to the extent of injury, though it is not true. I have to decide whether the privilege attached to that document—that some privilege is attached to it is not questioned—is of such a nature that the case is brought within the general principle of absolute privilege, or whether the privilege is merely qualified. If this were a matter of first impression, I am bound to say I do not think it would be very easy to answer. It might, on the one side, be considered essential to public policy that everybody should be absolutely free to say what they liked, to speak without fear of any kind. On the other hand, as Mr. Castle Miller points out, it may be that it is a case in which the person about whom the communication is made should have some rights and some consideration, and that people should not be free to say anything except what they believe to be true, and without malice. It might be very difficult, but Horridge, J., has decided something very similar in a case of *Collins* v. *Henry Whiteway & Co.* (1), and, if this is the same case as that, of course it was a decision clearly upon the point, and a considered judgment of that judge, and I should feel bound to follow him, although I may think it is a case very suitable for the Court of Appeal, if Mr. Devlin's clients see fit to go there. However, Mr. Devlin said to me, in the course of his argument: "I rather anticipated your Lordship would feel bound to follow that case unless I can show there is a difference, and the difference that I find is that between 1920 and 1935, and after the decision of Horridge, J., the legislature changed the nature, or some of the nature, of the proceedings upon this subject, and it must be assumed, or ought to be assumed, that they did it deliberately and intending to change something." Of course I must accept that. Then, however, Mr. Devlin says: "I am going further: I say that they did it because they wished to get rid of the decision of Horridge, J., because it was in the public interest that that decision should be got rid of." It took them a long time—eight years—to make up their minds to do that. However, I do not think that I am entitled to guess what the legislature intended to change. I think that I must find that out from what they have said, and I do not see anything in the changes which compels me to think that so remarkable a change as this was intended—because it undoubtedly would be a remarkable change. It seems to me that the positions under the two statutes were the same to this extent: both statutes intended to get a final decision, and they both intended to get a final decision by finally arriving at somebody whose opinion was to be indisputable. The consequence of that is that I find myself dealing with a publication in 1927 which may finally get to a person whose decision will be final. That publication has been dealt with by the judge, for whose opinion I have respect, and whom I feel bound to follow. A

When I get to 1935, I find that the publication is made in circumstances in which it will finally get to that same person, although it is true that the route is a little shorter. If I were inclined at this moment to speak in terms of electricity, I might say that it was short-circuited to some extent. However, I do not see that anything in the legislation of 1935 B compels me to think that the legislature intended this alteration, and, that being so, I must decide against Mr. Devlin upon the subject. In other words, I think that the decision of Horridge, J., is applicable to the present statute as much as it was to the older one, and I feel bound to follow it, and I do so. C

It is not for me to invite anybody to go to the Court of Appeal, but I am bound to say that I think this is a matter which might receive further consideration.

Solicitors: *Musson & Co.* (for the plaintiff); *W. T. Ricketts & Son* (for the defendants). D

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

LORD ADVOCATE *v.* INZIEVAR ESTATES, LTD.

E

[House of Lords (Lord Maugham, L.C., Lord Atkin, Lord Thankerton, Lord Macmillan and Lord Romer), **March 25, April 12, 1938.**]

Estate Duty—Property passing on death—Policy of assurance partially kept up for donee's benefit—Proportion of proceeds of policy on which estate duty payable—Customs and Inland Revenue Act, 1889 (*c.* 7), *s.* 11 (1) —*Finance Act,* 1894 (*c.* 30), *ss.* 1, 2 (1) (*c*). F

By the Customs and Inland Revenue Act, 1881, s. 38 (1), (2), as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1), it is provided that account duty (now represented by estate duty by virtue of the Finance Act, 1894, ss. 1, 2 (1) (*c*)) shall be imposed upon "money received under a policy of assurance effected by any person . . . on his life, where the policy is wholly kept up by him for the G benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit." In 1910, a policy of assurance on his own life was taken out by an assured who assigned the policy to donees (the respondents) in 1924. The assured paid the annual premiums between 1910 and 1924, and he also paid the four annual H premiums which fell due from 1924 to 1927 inclusive, being eighteen premiums in all. The seven annual premiums which fell due from 1927 until the death of the assured in 1935 were paid by the respondents, to whom the proceeds of the policy were paid upon the assured's death. Estate duty was thereafter claimed from the respondents in respect of four-elevenths of the proceeds of the policy, being the proportion which the premiums paid by the assured after the date of the assignation to the respondents bore to the total of premiums paid after that date. The respondents contended that estate duty was payable only in the proportion that the four premiums paid by the assured after the date of the assignation bore to the total premiums paid on the policy from its inception :—

HELD : upon a proper construction of the statutory provisions, estate duty was chargeable in respect of $\frac{4}{11}$ of the proceeds of the policy, being the proportion which the premiums paid by the assured after the date of the assignation bore to the whole premiums paid after that date.

Interlocutor of the First Division of the Court of Session in Scotland reversed.

[EDITORIAL NOTE. The only question here is whether the premiums paid before the assignment are to be considered or neglected in the calculation of the part of the policy kept up by the assured. Their Lordships have decided that only the period after the assignment is relevant.

AS TO POLICIES KEPT UP FOR A DONEE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 241, 242, para. 232 ; and FOR CASES, see DIGEST, Vol. 21, pp. 15, 16, Nos. 73-80.]

Cases referred to :

(1) *Lord Advocate* v. *Fleming*, [1897] A.C. 145 ; 42 Digest 735, *1578* ; 66 L.J.P.C 41 ; *sub nom. Lord Advocate* v. *Robertson*, 76 L.T. 125 ; *on appeal from* (1895), 22 R. 568.

(2) *A.-G.* v. *Meech* (1931), 15 A.T.C. 619.

APPEAL against an interlocutor dated Mar. 25, 1937, pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland (LORD NORMAND, Lord President, and LORD MONCRIEFF, LORD MORISON dissenting), whereby the assessment of the Commissioners of Inland Revenue was recalled and the appeal of the respondents was allowed. The facts and the arguments are set out in the opinions.

The Lord Advocate for Scotland (*T. M. Cooper, K.C.*), *J. H. Stamp*, and *T. B. Simpson* for the appellant.

J. G. McIntyre and *Wm. Grant* for the respondents.

LORD MAUGHAM, L.C. : My Lords, I am authorised to say that my noble and learned friends LORD ATKIN and LORD ROMER concur in the opinion which I am about to deliver. My Lords, this is an appeal against an interlocutor dated Mar. 25, 1937, pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland. The First Division by a majority allowed the appeal of Inzievar Estates, Ltd., the present respondents, and set aside an assessment made by the Commissioners of Inland Revenue and remitted the matter to the commissioners to re-adjust the same. The Lord Advocate, on behalf of the commissioners, supports the present appeal.

My Lords, the facts are fully stated in the opinion of my noble and learned friend LORD MACMILLAN, and I shall do no more than state them in the barest outlines. Mr. Archibald Dominic Smith Sligo, of Inzievar, Fife, effected a policy of assurance on his life for £20,000 in 1910. In 1925, having already paid 14 premiums, he executed a gratuitous assignation of the policy in favour of the respondents. After the assignation had been granted and intimated he paid the next four premiums. The respondents paid the remainder of the premiums—seven in number—which fell due up to the date of the death of Mr. Smith Sligo in 1935. The proceeds of the policy, amounting in all to £21,800, were paid to the respondents. It is admitted that some estate duty is, in these circumstances, payable under the Customs and Inland Revenue Act, 1889, s. 11 (1), and the Finance Act, 1894, s. 2 (1) (*c*). The question is, what is the proportion of the policy moneys in respect of which estate duty is so payable ? It will be convenient to set out the relevant portions of the two sections on which the appeal turns.

The Customs and Inland Revenue Act, 1889, s. 11 (1), provides :

> Subsect. (2) of sect. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended, as follows. . . . The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

The Finance Act, 1894, s. 2 (1) (*c*), making provision for estate duty, enacted :

> Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*c*) property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom.

My Lords, the provision in the Customs and Inland Revenue Act, 1881, s. 38 (2), is elliptical, and, as LORD NORMAND, Lord President, has observed, leaves to implication the proportion which has to be applied in a case where the policy is partially kept up by the donor for the benefit of the donee. I think that the matter might be somewhat clearer if the subsection were re-written in the following expanded form : The charge under the said section shall extend to moneys received under a policy of assurance effected by a person on his own life who shall die on or after June 1, 1889, notwithstanding that he shall have taken out the policy in the name of a nominee, or shall have assigned the policy gratuitously for the benefit of a donee, subject to the following provisions : (i) where the policy is wholly kept up by the person who effected the same for the benefit of a donee, whether nominee or assignee, the charge shall extend to the whole of the policy moneys ; (ii) where the policy is partially kept up by such person for the benefit of a donee, whether nominee or assignee, the charge shall extend to a part of the policy moneys in proportion to the premiums paid by that person.

It will be observed that, in so expanding the subsection, I have made no assumptions as to its true construction. I have only stated it in such a way as will, I think, assist in ascertaining the true meaning of that part of the section which I have put in the second provision. Some light is, however, thrown upon the meaning of the subsection by the decision of this House in *Lord Advocate* v. *Fleming* (1). This was a decision, so far as relevant, on the meaning of the Customs and Inland Revenue Act, 1881, s. 38 (2). It was held by this House, agreeing with the decision in the Court of Session, that a policy cannot be said to be kept up for the benefit of a donee until a donee has in fact been created. Accordingly, where the donee has paid all the premiums after the date of the assignment, no account duty is payable by the donee under the Act. It follows that the first provision of the section, as above expanded, can be clarified by making it run thus : " Where the policy after the date of a donation is wholly kept up by the donor for the benefit of a donee, the charge, etc." By parity of reasoning, the second provision may be read as follows : " Where the policy after the date of a donation is partially kept up by the donor for the benefit of the donee, the charge under the section is to extend to a part of the policy moneys in proportion to the premiums paid by the donor after the donation."

The question is, what does the word " proportion " signify ? It is not in dispute that the numerator in the fraction, to which the word proportion is pointing, must be the number of premiums paid by the deceased after the donation in 1925. The numerator in this case is therefore the figure four. The question is whether the denominator is 25, since there had been 25 annual premiums in all paid on the policy, which is the result of the decision of the Court of Session, or whether, on the other hand, the denominator is to be the number of annual premiums paid on the policy after the date of the assignation—namely, the figure 11, as the Crown contends.

My Lords, it is, I think, clear that the reference to a case where the policy is partially kept up for the benefit of the donee must include a case where the donor and the donee share in the payment of the annual premiums, though I do not think that the phrase can possibly be confined to such a case. Where, however, the donor and the donee have shared in the payment of some or all of the premiums after the date of the assignation, it would seem plain that the proportion designated in the subsection is the proportion in which they have paid such premiums after the donation. Moreover, in the latter part of the subsection, that portion which I have expanded in the second provision as above, the legislature is dealing, as I think, with events which happen after the assignation. There is nothing to indicate that the previous history as to the person who provided the premiums before the assignation has any bearing upon the matter. It would be strange if the fraction were to be affected by the circumstance that premiums under the policy of assurance effected by the donor had been paid during the early years by an affectionate parent, or by any third party. Moreover, the subsection seems to me to show by its language that the proportion is to be determined by events which take place after the donation, since those events only, according to the natural construction of the words, are contemplated by the use of the present tense in the two phrases " is wholly kept up, etc.," and "is partially kept up, etc." This result, indeed, would seem necessarily to follow, if the expansion of the section which I have suggested is accepted. For these reasons, I come to the conclusion that the proportion must be taken to be a proportion based upon the shares which the donor and donee respectively have taken in keeping up the policy after the date of the assignment. This conclusion agrees with the opinion of Lord Morison in the First Division, and it also appears to have been the view taken by Rowlatt, J., in the case of *A.-G.* v. *Meech* (2), to which we have been referred. The appeal of the Crown should be allowed, and the original assessment must be maintained.

Lord Thankerton : My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the Woolsack, and also in the opinion about to be delivered by my noble and learned friend Lord Macmillan, which I have had the advantage of reading.

Lord Macmillan : My Lords, in 1910 the late Mr. Smith Sligo took out a policy of assurance for £20,000 on his life with the Scottish Metropolitan Assurance Co., Ltd. In 1924 he transferred the policy to the respondents, a private unlimited company, to which shortly afterwards he transferred also his landed estates. The transfer of the policy though stated to be in consideration of the payment of a sum of £4,550, was in fact gratuitous. At the time of the transfer, the deceased had paid 14 annual premiums, and after the transfer he continued to pay the premiums for four more years. Thereafter, for the seven following years the premiums were paid by the respondents, until the death of the assured on Apr. 23, 1935, when the proceeds of the policy, amounting to £21,800, were paid over to the respondents. Thus, of the 25 premiums paid in all, 18 were paid by the deceased—14 before, and 4 after, the transfer of the policy—and 7 were paid by the respondents.

The parties were agreed that, on the death of the assured, estate duty was payable on some part of the proceeds of the policy, but they were at variance as to the appropriate fraction. The commissioners of inland revenue maintained that the correct proportion was $\frac{4}{11}$, and assessed the respondents accordingly. The respondents, maintaining that the correct proportion was $\frac{4}{25}$, appealed to the Court of Session under the Finance Act, 1894, s. 10. The judges of the First Division by a majority allowed the appeal, Lord Normand, Lord President, and Lord Moncrieff being of opinion that $\frac{4}{25}$ was the correct proportion while Lord Morison was of opinion that it should be $\frac{4}{11}$. The Crown now asks your Lordships to restore the original assessment on $\frac{4}{11}$.

My Lords, the question turns on the interpretation of a few words in the Customs and Inland Revenue Act, 1889, s. 11 (1), which in such cases imposed account duty (now represented by estate duty) in the following terms :

> The charge . . . shall extend to money received under a policy of assurance

> effected by any person dying on or after June 1, 1889, on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit.

The present case is one in which the policy was not wholly, but only partially, kept up by the deceased for the benefit of the donee. In such
A a case, the charge is upon a part only of the proceeds of the policy, such part being proportionate to the premiums paid by the deceased. I agree with LORD NORMAND, Lord President, that this means that the part is to be proportionate to the premiums paid by the deceased for the benefit of the donee. As LORD NORMAND, Lord President, points
B out:

> The premiums which are paid by the assured before there is a donee are paid to keep up the policy for the benefit of his own estate.

The obvious truth that a policy cannot be said to be kept up for the benefit of a donee until after the donee has come into existence—that is
C to say, until after the donation has been made—was the basis of the decision of your Lordships' House in *Lord Advocate* v. *Fleming* (1). The premiums paid by the deceased in the present case to keep up the policy for the benefit of the donee—that is to say, the premiums paid by him after the transfer of the policy to the respondents—were four in number.
D The parties are agreed that this figure must be the numerator of the fraction. The Crown say that the proportion should be as four is to eleven, being the number of premiums paid after the transfer, while the respondents say that the proportion should be as four is to twenty-five, being the total number of premiums paid since the policy was originally
E taken out.

Three situations may arise where a policy has been transferred by the assured to another party during its currency. First, the assured may pay no further premiums in respect of the policy after its transfer. In that case, the subsection has no application. The policy has ceased
F on transfer to be an asset of the deceased's estate. The only claim which the Crown could have to estate duty on the death of the assured would be where the transfer had been to a gratuitous donee within three years of the assured's death. That claim would not be under the present subsection but under quite a different head. The subsection, as LORD
G ADAM pointed out in *Lord Advocate* v. *Robertson* (1), at p. 574, applies only "where a policy is wholly or partially kept up by the donee after the date of the assignation." In the case of *Lord Advocate* v. *Fleming* (1), no premiums were paid by the donor after the date of the assignation. The subsection consequently had no application, and no duty was due,
H for the policy had never been kept up, either wholly or partially, by the deceased for the benefit of the donee. In the second place, all the premiums after the assignation may be paid by the donor. The subsection applies, for the policy has, after the assignation, been wholly kept up by the donor for the benefit of the donee. In such a case, the whole proceeds of the policy are subject to duty. In the third place,

as here, some of the premiums after the assignation may be paid by the donor and some by the donee. Here also the subsection applies, for the policy has, after the assignation, been partially kept up by the deceased donor for the benefit of the donee.

My Lords, to my mind it is clear from these considerations that the subsection is concerned only with what happens during the period between the assignation of the policy to the donee and the death of the assured. Of the eleven premiums paid during that period in the present case, the deceased paid four and the donees paid seven. That is to say, the deceased paid $\frac{4}{11}$ and the respondents paid $\frac{7}{11}$ of the premiums falling due during that period. It follows, in my opinion, that the part of the proceeds of the policy which is proportionate to the premiums paid by the deceased within the meaning of the statute is $\frac{4}{11}$. I am fortified in this reading of the subsection by the fact that it also commended itself to Rowlatt, J., who in *A.-G.* v. *Meech* (2) said of the subsection :

> I think it simply means that where, after the assignment, what has kept up the policies has been provided partly by the assignor and partly by the assignee, the policy moneys are to be subject to and escape duty in the same proportion.

Mr. McIntyre for the respondents, in a concise and admirably reasoned argument, submitted that the appellant's reading of the subsection offended against the principle of *Lord Advocate* v. *Fleming* (1)—namely, that a policy could not be said to be kept up for a donee when there was no donee in existence. For the appellant's reading involved this, that a policy kept up by the donor for the benefit of a donee after assignation was wholly kept up for the benefit of the donee within the statutory meaning, and the entire proceeds were consequently liable to duty, whereas in point of fact the policy might, for many years before assignation, have been kept up by the assured for his own benefit. It was wrong to regard a policy as wholly kept up for the benefit of a donee when it had been kept up for the benefit of a donee during only part of its currency. The sound view, therefore, was that a policy was wholly kept up for the benefit of a donee in the statutory sense only when the policy during the whole of its currency was kept up for a donee. Similarly, a policy was partially kept up for the benefit of a donee when, during part of its currency, it was so kept up by the assured. The factors in striking the proportion should therefore be (i) the number of premiums paid on behalf of the donee, and (ii) the number of premiums paid during the whole currency of the policy. Otherwise, part of the proceeds, representing premiums paid when there was no donee in existence, would be subjected to duty.

My Lords, I appreciate the anomaly, but I fear that there is no reading of this imperfectly drafted subsection which will avoid all illogicalities. In my view, the manner in which the respondents seek to invoke the aid of *Lord Advocate* v. *Fleming* (1) is not justified, for the principle of that case, as I understand it, is that one is to have regard only to the period after assignation and ascertain by whom the premiums were paid between the assignation and the death of the assured. If, during that period, no premium was paid by the donor, the proceeds of the policy escape duty. If all the premiums were paid by the donor, the whole proceeds are subjected to duty. If some of the premiums were paid by the donor, the proceeds are subjected to duty to the extent of the proportion which the number of premiums paid by the donee during that period bears to the total number of premiums during that period. In short, when the subsection speaks of keeping up a policy for the benefit of a donee, it refers to the period after the donee has come into existence—that is to say, the period after assignation of the policy to the donee—and any consideration of what happened before the assignation is excluded. I am accordingly of opinion that the appeal should be allowed, that the interlocutor of the First Division of the Court of Session of Mar. 25, 1937, should be reversed, and that your Lordships should declare that the respondents are liable to estate duty in respect of $\frac{4}{11}$ of the sum of £21,800 referred to in the appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*, agent for *Solicitor of Inland Revenue*, Edinburgh (for the appellant); *Blount, Petre & Co.*, agents for *Tait & Crichton, W.S.*, Edinburgh (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

HORNCHURCH URBAN DISTRICT COUNCIL *v.* ALLEN.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Macnaghten, JJ.), **April 8, 1938.**]

Highways—Streets—Private street works—Resolution of local authority that apportionment be based on degree of benefit to be derived by any premises—No exercise by local authority of statutory power to require a variation of relative widths of existing carriageway and footways—Discretion of local authority—Whether proposed works reasonable—Wider road for benefit of through traffic—Private Street Works Act, 1892 (*c.* 57), *ss.* 7 (*d*), 10.

Certain private street works were being done in Hornchurch, where the provisions of the Private Street Works Act, 1892, had been adopted. Pursuant to sect. 10 of the Act of 1892, the appellant council passed a resolution to the effect that, in settling the provisional apportionment of expenses of such works, regard be had to the greater or less degree of benefit to be derived by any premises from such works. The appellant council did not exercise the power conferred on it by the Public Health Act, 1925, s. 35, to require a variation of the relative widths of the existing carriageway and footways of the street. Objections were taken to the provisional apportionment, on the grounds that the proposed works were unreasonable, as the road was a connecting road and the expenses were largely incurred for the benefit of through traffic. The justices dismissed the objections, but on appeal to quarter sessions the objections were upheld:—

HELD: as the Private Street Works Act, 1892, s. 10, provides that it is in the sole discretion of the local authority whether or not it will pass a resolution affecting the mode of apportionment, it was not open to the court to uphold the objections to the provisional apportionment.

[EDITORIAL NOTE. In *Chester Corpn.* v. *Briggs* (1), SALTER, J., while he agreed with the judgment of the court, stated his view that justices should consider, in a case such as this, whether it is reasonable that such works should be carried out at the frontager's expense. This view has in effect often been rejected by the court, and it has always been held that the statute, in the absence of a resolution by the local authority under sect. 15 thereof, places the whole burden of making the road upon the frontagers, although the making of the road is partly for the benefit of others. In the present case the cost of making a wider road, required only for the purpose of through traffic, is thrown upon the frontagers.

As to Objections by Owners, see HALSBURY, Hailsham Edn., Vol. 16, pp. 457-459, para. 663 ; and for Cases, see DIGEST, Vol. 26, pp. 543-547, Nos. 2409-2447.]

Case referred to :

(1) *Chester Corpn.* v. *Briggs*, [1924] 1 K.B. 239 ; 26 Digest 547, *2447* ; 93 L.J.K.B. 69 ; 130 L.T. 221.

Appeal by way of special case stated by the appeal committee of the Essex Quarter Sessions. The facts and the arguments are set out in the judgments of Lord Hewart, L.C.J., and Humphreys, J.

R. M. Montgomery, K.C., and *Percy Lamb* for the appellants.

A. M. Trustram Eve, K.C., and *R. P. Winfrey* for the respondents.

Lord Hewart, L.C.J. : This is a case stated by the appeal committee of the court of quarter sessions for the county of Essex. The case arises in the following way. There was a decision of the court of summary jurisdiction for the petty sessional division of Romford dismissing certain objections which had been taken to a provisional apportionment by the appellant council's surveyor—that is, the surveyor to the Hornchurch Urban District Council—in accordance with the Private Street Works Act, 1892, in respect of a street known as Betterton Road, Hornchurch, in Essex, and confirming an apportionment under it. Those objections having been dismissed, there was an appeal to quarter sessions, and the court of quarter sessions, upon hearing the appeal, ordered

> that the appeals be allowed with costs and that the resolution, plans and section, estimate and provisional apportionment be quashed.

The appellant council, the urban district council, being dissatisfied with that determination, asked for a case to be stated, and accordingly this case is stated.

Although the argument has taken a great deal of time, the point which is raised is reasonably concise. Para. 6 of the special case recites that the Private Street Works Act, 1892, had been adopted by the appellant council, and was at the material time in force in the urban district of Hornchurch, that the appellant council was the urban sanitary authority for that district, and that the road referred to is a street within the meaning of the Act. Then comes para. 6 (*c*) :

> The appellant council by resolution dated Sept. 17, 1935, resolved to do certain private street works with respect to the said street and, pursuant to sect. 10, further resolved that in settling the provisional apportionment of expenses of such works, regard be had to the following considerations (that is to say) the greater or less degree of benefit to be derived by any premises from such works.

Accordingly, a specification of the works was prepared, an estimate of the probable expense was made, the provisional apportionment was also made, and, in conformity with the resolution, in apportioning the estimated expense, regard was had to the greater or less degree of benefit to be derived by any premises from the works.

Those steps having been taken, the specifications, plans, sections, and so on, were duly submitted to the appellant council, and by resolution dated Jan. 19, 1937, were approved by it. There was due publication of the resolution, and there was a due opportunity given for inspection of the specification and the other documents. Then the case goes on to say that the developer's lay-out plans and the notice of intention to lay out the road showed a 24 ft. carriageway with two 8 ft. paths, and that the street had in fact been laid out in accordance with those plans and consisted of a 24 ft. carriageway with two 8 ft. footpaths. The plans and sections and so forth were prepared by the council's surveyor, and provided for a carriageway 24 ft. wide with two 8 ft. footpaths and certain paving, tarmac and kerb. The case further finds as a fact that the specification referred to was the appellant council's standard specification for roads with a carriageway 24 ft. wide. This road, it is further said, is one of several roads connecting the arterial road leading from Tilbury to London with a road leading from Dagenham to Hornchurch, and it is probable, the case states, that, as such connecting road, it will be used by through traffic. On the other hand, by contrast with a road 24 ft. wide, the case finds that a road with a carriageway of 20 ft. would be sufficient to cope with the requirements of the frontagers to Betterton Road. In other words, the case clearly says that, if the subject-matter under consideration were the requirements of the frontagers to Betterton Road pure and simple, a road of less width would have sufficed. Finally, the case finds that the appellant council has not exercised the power conferred on it by the Public Health Act, 1925, s. 35, to require a variation of the relative widths of the existing carriageway and footways of the street.

In that state of the facts, certain contentions on the one side and on the other were raised, to which I must presently, and, I hope, very briefly, refer, but, before I do that, it may be well to look once more at what is the foundation of the whole of this matter—that is, the provisions of the statute with regard to provisional apportionment. By the Private Street Works Act, 1892, s. 10, it is provided:

> In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned [in a certain way].

That is the clearest possible direction. It is the laying down of a universal affirmative rule, which can be departed from only if certain conditions are fulfilled. The rule, the standard, the normal procedure, is that the apportionment of expenses against the premises fronting, adjoining or abutting shall be apportioned according to the frontage of the respective premises. That general rule having been laid down, however, the section goes on to provide for certain possible variations, which are optional. They are optional at the choice, that is to say, within the discretion, of the urban authority itself. Three of them are enumerated. It does not in the least follow that, if one is adopted, the others must also be adopted, or that any of the others must be adopted. The matter is left, and, in my opinion, most deliberately left, within the discretion of the urban authority. The urban authority may, if they think just, resolve that, in settling the apportionment, regard shall be had to various considerations, and the first which is named is:

> The greater or less degree of benefit to be derived by any premises from such works.

Two other possible courses by way of supplement are also contemplated, but always at the discretion of the local authority. They do not arise in this case. They did arise in a case which was argued at some length before us a few weeks ago. So far as this case is concerned, the urban authority has been content, within the exercise of its undoubted discretion, to resolve merely that in settling the apportionment regard shall be had to

> the greater or less degree of benefit to be derived by any premises from such works.

That resolution having been made, it was contended on the part of the respondents in the court below that the proposed works were partly for the benefit of the frontagers and partly for the benefit of the general public. It was contended that a carriageway with a width of 24 ft. was necessary only because of through traffic, and that a carriageway with a width of 20 ft. would be sufficient for the local traffic. It was contended further that it would be unreasonable to throw upon the frontagers the burden of works which were partly for the benefit of others; and yet again, in words of perfect clearness, words perfectly free from any kind of ambiguity, it was contended in the court below that there was nothing in law which compelled the appeal committee of quarter sessions to dismiss an objection pursuant to the Private Street Works Act, 1892, s. 7, if it were satisfied that the appellant council was endeavouring to throw upon the frontagers the cost of works which were partly for the benefit of the frontagers and partly for the benefit of others. In other words, the court of quarter sessions was in the clearest possible terms invited by the respondents to dismiss the objection which had been taken, because the true view of the whole matter was that an attempt was being made to throw upon the frontagers the cost of work which, though it was partly for their benefit, was also partly for the benefit of others. It was said that that endeavour was unreasonable, and the appeal committee were induced to take, and undoubtedly did take, that view. Their finding is set out in perfectly clear terms in para. 10 of the case. They decided

> that a 20 ft. carriageway was reasonably sufficient for the needs of the said frontagers

> and to the extent that the said works would impose upon the said frontagers an expense greater than that of a 20-ft. carriageway such works were unreasonable.

Taking that view, the appeal committee ordered that the appeals of the respondents be allowed with costs, and that the resolution, plans, and section, estimate and provisional apportionment should be quashed.

A What was the contention on the other side ? It is not without interest to observe that, as has appeared in the course of the argument, the contentions on the other side are not in substance contested. They were, first, that, as the street had been laid out in accordance with the lay-out plans and the notice of intention to lay-out the street—that is to say, B with a 24-ft. carriageway and two 8-ft. paths—the appellant council was bound to take the street as it found it, unless it exercised its powers under the Public Health Act, 1925, s. 35, and was entitled to make it up to the full width thereof. Secondly, it was contended

> C that the question of the variation of the relative widths of the carriageway and footways in pursuance of the Public Health Act, 1925, s. 35, was one for the appellant council's discretion.

Thirdly, it was contended

> that the appellant council not having exercised the power conferred on it by the Public Health Act, 1925, s. 35, of requiring a variation of such relative widths, it could not be compelled to require such variation.

D Finally, it was contended

> that it was not competent for the appeal committee to alter such relative widths or to hold the proposed works unreasonable on the ground that they did not vary the existing width of the carriageway.

Those contentions being admitted, what was left of the area of dispute ? E Within what limits did the dispute remain ? I think that the limits are perfectly plain. The statute provides quite clearly that, subject to certain named exceptions, a uniform, normal standard of apportionment shall prevail. The expenses shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises. F The only resolution by way of variation at which the urban authority in this case arrived was a resolution making an exception in favour of the consideration of " the greater or less degree of benefit to be derived by any premises from such works." Therefore, the overriding principle prevails that, for the purpose of these expenses, the apportionment must G be according to their frontage. That did not suit the respondents, however. They were not, indeed, prepared to make a frontal attack upon the resolution, or upon the policy, or upon the discretion of the urban district council, but, by what I can only regard as a not very ingenious subterfuge, they sought to get round the matter in another H way. They said in effect, when one looks at their contentions in para. 8 (4) : " Now it may well be that the justices cannot prescribe a resolution to the urban authority. It may well be that the justices cannot usurp the discretion which the legislature has deliberately given to those who are the local representatives of the public. The justices can, however, behave in such a way as to render nugatory the course which

ADDENDUM: Read before the last paragraph following the words "... partly for the benefit of others.":

The course which the argument has taken suggests that some misunderstanding as to the true scope and effect of the law laid down in *Chester Corpn.* v. *Briggs* (1) has been caused by the *dictum* at the end of the judgment of SALTER, J. ([1924] 1 K.B. 247):

> In considering an objection under s. 7 (*d*) that the proposed works are unreasonable the justices are entitled to consider, among other things, whether the proposed works are reasonable in the sense that it is reasonable that such work should be done at the frontagers' expense.

That *dictum*, if it implies that the discretion given to the local authority by the statute is in any way subject to revision or control by the justices, finds no support in the judgments of the other members of the court, nor is any approval to be implied from silence, since they gave judgment before that *dictum* was pronounced, and with no knowledge that it was intended to be pronounced For myself, I must regard the judgment of SALTER, J., as having been to that extent a dissenting judgment, with which I was, and still am, unable to agree While the authority of the decision in *Chester Corpn.* v. *Briggs* (1) remains unimpaired, it should henceforth be understood that that *dictum* is not approved by this court, and cannot be relied on to justify what was done by the appea committee in the present case.

into the authorities, I have no doubt, speaking for myself, that this appeal ought to be allowed, and that the consequential results ought to follow.

HUMPHREYS, J.: I am of the same opinion. I agree with LORD
A HEWART, L.C.J., that the law upon this matter is to be found entirely in the Private Street Works Act, 1892. It is, I think, sect. 6 of that Act which, in the first place, provides in clear and unmistakable language upon whom is to fall the burden of paying the expenses of executing private street works. Sect. 6 provides:

> B . . . the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street.

That is the law to-day. Sect. 10 provides for different methods to be adopted by those who have to prepare and make a provisional apportionment, but it is an apportionment on the frontagers, and in this case
C a provisional apportionment was made upon the frontagers in accordance with sect. 6. In accordance with sect. 10 of the Act, the apportionment was made according to the greater or less degree of benefit to be derived by any particular premises—that is, fronting premises—from such works. As LORD HEWART, L.C.J., has said, there is to be
D found in sect. 10 a provision which has no applicability to this case, which enables the apportionment to be made, in particular circumstances, upon persons who are not the owners of premises actually fronting. *Prima facie*, and for the purposes of this case, the expenses of making up this road are to be paid by the frontagers.

E What road was necessary or reasonable? In considering any objections to an apportionment, the justices, in the first place, are to have regard to objections such as those specified in sect. 7 of the Act—that the proposed works are unreasonable, or that the estimated expenses are excessive. Those objections were made in this case. The justices
F heard them, and they declined to give effect to them. Thereupon, there was an appeal to quarter sessions, and, on the face of it, the grounds of appeal appear to raise the same point as had been decided by the justices. It is clear, however, that, whatever was argued before the appeal committee, which takes the place of the old quarter sessions in hearing appeals,
G the appellants there failed to satisfy the appeal committee that the proposed works were unreasonable. All that they could get, and all that is to be found in the findings of fact stated by the appeal committee in this case, is that a road with a carriageway of a width of 20 ft., as distinguished from a road which in this case was 24 ft., would be sufficient
H to cope with the requirements of the frontagers to the road, a finding which might be of great importance if the road were one which was to be of use to the frontagers only. However, the appeal committee find this further fact:

> Betterton Road [the road in question] is one of several roads which connect the arterial road leading from Tilbury to London with a road leading from Dagenham

> to Hornchurch, and it is probable that as such connecting road, it will be used by through traffic.

The appeal committee must be taken to have been satisfied, therefore, that a 24 ft. road was not unreasonable, having regard to the use which in all probability would be made of this road.

The argument which is to be found in the contentions of the respondents is, first of all, that the proposed works in Betterton Road were partly for the benefit of the frontagers and partly for the benefit of the general public. There is no doubt that that is perfectly true. Roads are made partly for the benefit of frontagers and partly for the benefit of the general public. Secondly, they contend that a carriageway with a width of 24 ft. was necessary—they appear to admit that it was necessary—only because of the through traffic, and that a carriageway with a width of 20 ft. would be sufficient for the local traffic. Thirdly, and boldly, they contend that it would be unreasonable to throw upon the frontagers the burden of works which were in part for the benefit of others, and it was that contention which found favour with the appeal committee.

In my view, what the appeal committee have done here is to say quite plainly: "Because we disapprove of the Act of Parliament which has put upon the frontagers, and has required to be put upon the frontagers, the whole expense of making up such a road as this, we decline to give effect to it, and we shall say that that which we are bound to say was necessary is nevertheless unreasonable, because by the Act of Parliament the expense of doing it falls upon a particular class of person." I ask myself by what right quarter sessions take upon themselves the duty, which no doubt they thought it was, to make any such pronouncement at all. Whether it is reasonable or unreasonable that frontagers should be required to pay for the expense of making up a new road is a matter which they had no more right to consider than has this court. Parliament has declared that they shall.

There was no attempt in this case, apparently, to say that the estimated expense of doing the works was excessive, which means that, assuming the work had to be done, the cost of it was not unreasonable or excessive. That being so, it appears to me that the case was unarguable. I regard it as a very plain case of that sort which comes, not for the first time, before this court, where a body of justices, in this case forming the appeal committee, have endeavoured not to comply with and follow the Act of Parliament, but to evade it. I agree with LORD HEWART, L.C.J., in the judgment which he has pronounced.

MACNAGHTEN, J.: I respectfully agree with both the judgments which have been delivered, and have nothing that I can usefully add.

Appeal allowed with costs. Leave to appeal refused.

Solicitors: *Sharpe, Pritchard & Co.* (for the appellants); *Yarde & Loader* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ADDENDUM: Read before the last paragraph of the judgment of HUMPHREY J., following the words " . . . has declared that they shall."

If it be sought to justify what was done by quarter sessions by the *dictum* SALTER, J., in *Chester Corpn.* v. *Briggs* (1) I need only say that I entirely agr with what my Lord has now said about that *dictum*.

J. A. MILESTONE & SONS, LTD. (IN LIQUIDATION) *v.* YATES CASTLE BREWERY, LTD.

[KING'S BENCH DIVISION (Singleton, J.), **January 18, March 1, 1938.]**

Building Contracts—Subcontractors—Right of building owner to pay subcontractor direct—Power of architect to give certificate in favour of subcontractor after certificate given in favour of contractor.

The plaintiffs contracted to build a hotel for the defendants, the contract being in the standard form recommended by the Royal Institute of British Architects (1909 edition). When the greater part of the work had been completed and paid for, the plaintiffs went into liquidation. The balance of the contract price outstanding at that time was £1,234 16*s.* 6*d.* As to £643 0*s.* 9*d.*, part of that balance, the defendants contended that they were entitled by the terms of the contract to pay it direct to various subcontractors, who had been nominated by the defendants' architect. The architect had issued a certificate in favour of the contractors, including sums due to subcontractors, and later, in some cases on the day on which the writ in this action was issued, and in others at a later date, gave certificates in respect of the same matters in favour of the subcontractors. No contractual obligation to the subcontractors was pleaded, but reliance was placed upon a clause in the contract which said that such sums should be paid to the subcontractor by the contractor or by the employer as the architect should direct:—

HELD: the certificates in favour of the subcontractors were invalid, and did not empower the defendants to pay the subcontractors direct.

[EDITORIAL NOTE. Where there is a power to issue certificates in favour of the contractors or of the subcontractors, it is a question of some importance whether the architect, having once issued a certificate, is then *functus officio*, or whether he can issue a further certificate, which would, of course, be in favour of the other type of contractor. What is decided here is that he cannot issue a further certificate after a dispute has arisen between the various parties, because it is then for an arbitrator or the court to say what are the rights of the parties in the circumstances then existing.

AS TO PAYMENT OF SUBCONTRACTOR BY EMPLOYER, see HALSBURY, Hailsham Edn., Vol. 3, pp. 313-315, paras. 580-582; and FOR CASES, see DIGEST, Vol. 7, pp. 424-427, Nos. 369-375.]

Cases referred to:

(1) *Hobbs* v. *Turner* (1902), 18 T.L.R. 235; 7 Digest 424, *363*.

(2) *British S.S. Investment Trust, Ltd.* v. *Foundation Co., Ltd.* (1930), December 15, Unreported.

(3) *Lloyd Brothers* v. *Milward* (1895), 2 Hudson's B.C., 4th Edn., 262; 7 Digest 359, *107*.

APPEAL from an arbitrator by way of a special case stated at the request of the parties. The Yates Castle Brewery Co. contracted with J. A. Milestone & Sons, Ltd., for the building of a hotel. The conditions of the form of contract published by the Royal Institute of British Architects (1909 edition) formed part of the agreement between the parties. When the greater part of the work had been carried out, and paid for, the builders went into liquidation. A considerable part of the work was to be done by subcontractors nominated by the architect, and, before the date when the builders went into liquidation, some had been partly paid. A considerable part of the contract price had been paid to the builders on certificates which covered some of the work done by the subcontractors whom the builders had not paid. The building owners proposed to pay them direct, and claimed to deduct the amount expended from the balance of the contract price due to the builders. To this objection was taken, and the dispute was ultimately submitted to arbitration under the contract. The following paragraph of the points of defence shows the position :

> In particular, for instance, the Empire Stone Co., Ltd., have rendered a final account claiming to have been entitled to £976 2*s.* 4*d.* A sum of £1,050 had already been paid by the defendants to the plaintiffs on certificates issued by the architects prior to the liquidation, expressly including that sum for the Empire Stone Co. It is admitted that the plaintiffs did not pay the Empire Stone Co., Ltd., the full £1,050, but it is submitted that the architects having already certified rather more than the full amount payable, and having directed payment thereof, and payment having been made to the plaintiffs, the architect can do no more in the matter, and cannot give further certificates and directions.

The arbitrator made an award in favour of the defendants' contention. At the request of the parties, he made his award in the form of a special case for the opinion of the court, and made an alternative award in case he should be held to be wrong.

Maxwell Fyfe, K.C., and *A. Hamilton* for the plaintiffs.

F. E. Pritchard, K.C., and *Gordon Glover* for the defendants.

Singleton, J. : This dispute arises out of a contract made between J. A. Milestone & Sons, Ltd., and Yates Castle Brewery, Ltd., on Nov. 21, 1933. Messrs. Milestone are, or were, builders and contractors. They are referred to in the award as "the plaintiffs," and I shall so refer to them. Yates Castle Brewery, Ltd., were the building owners, and are referred to as the defendants. The contract was a contract under which the plaintiffs agreed to build a hotel for the defendants for the sum of £12,790, subject to, and on the terms of, conditions which are contained in a schedule attached to the contract, to which I shall refer later. The plaintiff company went into liquidation in Sept., 1935, before the payment due under the contract had been completed, and before final accounts had been adjusted. The defendants and the architect claimed a right to pay certain specialists direct, and to deduct the amount so paid from the amount which the plaintiffs claimed.

On Mar. 25, 1936, the plaintiffs issued a writ claiming the sum of £1,234 16*s.* 6*d.* for work done. The defendants then took out a summons asking that all further proceedings should be stayed pursuant to the Arbitration Act, 1889, s. 4, and that the matter should be referred to arbitration in accordance with the arbitration clause in the contract. On Apr. 8, 1936, an order was made staying proceedings, and the matter was ultimately referred to arbitration. The arbitrator made an award on Nov. 9, 1936, but later, at the request of the parties, that award was treated as set aside, and an award was made in the form of a special case.

The arbitrator awarded the sum of £451 15*s.* 4d. to the plaintiffs, the amount which the defendants had tendered. He did not accept the contentions of the plaintiffs. He stated what should happen if the court should hold that his view was wrong, and if it should be held that the defendants had no power to withhold from the plaintiffs such moneys as were payable in respect of work done by specialists or subcontractors.

The argument before me was directed mainly to the true construction A of the contract and of the printed conditions forming part of it. I was also referred to the general conditions attached to the bill of quantities and specification, but these do not appear to have been expressly incorporated, and in any event I do not think that they provide much help.

Clauses 2, 3, 4 of the contract itself provide as follow :

B

> 2. The employer will pay the contractor the said sum of £12,790 or such other sum as shall become payable hereunder at the times and in the manner specified in the said conditions.
>
> 3. The term architect in the . . . conditions shall mean the said Rees and Holt, or, in the event of his death or ceasing to be the architect for the purpose of the contract, such other person as shall be nominated for that purpose by the employer . . . provided always that no subsequently appointed architect under C this contract shall be entitled to disregard or overrule any decision or approval or direction given or expressed by the architect for the time being.
>
> 4. The said conditions shall be read and construed as forming part of this agreement. . . .

Of the conditions in the schedule, the most important for the purposes of this case are Nos. 20, 28, 29 and 30. No. 30, which deals with payment, D provides as follows :

> 30. The contractor shall be entitled under the certificates to be issued by the architect to the contractor . . . to payment by the employer . . . when in the opinion of the architect work . . . has been executed in accordance with the contract.

E It is to be observed that this condition deals with the issue of certificates to the contractor, and to no one else. It is clear, however, that the contract contemplates the doing of parts of the work, and the supply of some materials, by others, and the position is governed by conditions Nos. 20, 28 and 29, which provide as follow :

F

> 20. All specialists, merchants, tradesmen or others executing any work or supplying any goods for which the prime cost prices or provisional sums are included in the specification, who may at any time be nominated, selected or approved by the architect are hereby declared to be subcontractors employed by the contractor. . . .
>
> 28. The provisional sums mentioned in the specification for materials to be supplied, or for work to be performed by special . . . tradesmen or for other work G or fittings to the building shall be paid . . . to and in favour of such persons as the architect shall direct, and the sums so expended shall be payable by the contractor without discount or deduction or . . . by the employer to the said . . . tradesmen.
>
> 29. The contractor shall permit the execution of the work by any other . . . tradesmen who may be engaged by the employer.

Mr. Maxwell Fyfe submitted that there was no privity of contract H between the defendants and the nominated subcontractors. He further submitted that there was no power in the architect to direct payment to any subcontractor, nor was there any right in the defendants to pay any subcontractor direct. At the most, he argued, condition No. 28 gave a right to the defendants to pay someone they themselves had engaged under condition No. 29, whereas the firms in respect of whose claims amounts were sought to be deducted were subcontractors under condition No. 20.

Mr. Pritchard submitted that condition No. 28 gave power to the architect to direct that payment should be made to and in favour of special artists or tradesmen, that any such direction must of necessity be directed to someone, and further that the words in No. 28 of the printed A conditions—" and sums so expended shall be payable by the contractor . . . or by the employer to the said artists or tradesmen "—made it abundantly clear that the parties had contracted on the basis that payment might be made in this way. He did not agree that there was no privity of contract between the defendants and the subcontractors, B citing the decision of the Court of Appeal in *Hobbs* v. *Turner* (1), but he submitted that that was not relevant and that it did not matter whether or not there was privity.

I do not think that it is necessary for me to determine the question as to whether or not there was privity of contract between the defendants C and the subcontractors. The case of *Hobbs* v. *Turner* (1) was a case in which the same condition, No 28, was considered, but the decision was on the facts of that case, which are by no means the same as those in the present case, and it cannot be said that the effect of the decision is that, in every building contract in which condition No. 28 D is embraced, the subcontractors are in contractual relationship with the building owner. I should require further argument before I was satisfied that there was such relationship in this case. Condition No. 28 is, in my view, wide enough to enable the architect to direct payment to special artists or tradesmen, and to enable the employer to pay them. E If that is done in proper form, and at the proper time, it is a payment under the contract, and is in accordance with the agreement between the parties to the contract. Mr. Pritchard's argument on the true construction of condition No. 28 succeeds.

Mr. Maxwell Fyfe, however, takes two further points. He submits F that the architect, having given a direction or issued a certificate to the contractor covering an amount due to a subcontractor, cannot thereafter give a direction that the employer (the defendants) shall pay that sum or part of it to the subcontractor, nor is there any power to issue a certificate to the subcontractor in respect of the amount or part of it. G He referred me to an unreported decision of Maugham, J., in *British S.S. Investment Trust, Ltd.* v. *Foundation Co., Ltd.* (2):

> If I come to consider the rights of the tradesmen who do come within the first part of cl. 2, I think that I have to bear in mind the circumstance that the payment by the building owner here, the railway company, to the tradesmen direct, with H whom they have no contractual relation, must have two consequences: (i) that the tradesman accepting that payment will have to deduct the sum paid to him under that clause from his claim, and (ii) that the railway company will be entitled to deduct the sum paid to the subcontractor from money due to the contractor on a certificate. Further, I think that a number of circumstances must be borne in mind in considering the operation of such a clause. It is plain that there may be disputes between the contractor and the tradesman in which the building owner may have no concern. It is plain that the terms of credit between the contractor

> and the tradesman may be of a special kind. In this case, as in most cases, the contractor is, in the first instance, paid on the certificate only a percentage of the total amount due. In the first case, he is paid 80 per cent., then perhaps another 10 per cent. after a period of maintenance, while the tradesman may, and very often would be, entitled to the whole of the amount due to him from the contractor. Further, I think that it is not unreasonable to remember that the contractor may be at a particular moment in very urgent need of money to be paid on his certificates, partly by reason of the fact that he is being paid only in part for the work which he has done, and partly in consequence of unforeseen circumstances. All these grounds lead me to think that a clause entitling the building owner to pay a subcontractor, with whom he has no contractual relation, for work done and materials supplied ought, I think, to be strictly construed.
>
> If the architect includes in his certificate under the terms of the contract the price of work done or materials supplied by the tradesman, less, we will say, 10 per cent., or some other percentage, which has to be, or which is, retained by the building owner, what is the position ? Can the railway company, after having paid to the contractor the sum due to the tradesman, deduct it from some future payment in respect of other work if it turns out that the contractor has not paid the tradesman, or is the payment to the contractor an election to pay him, and not to exercise the alternative right of paying the subcontractor direct ? On the true construction of the present contract, and having considered to the best of my ability the various provisions in the general conditions and in the specification, I am of opinion that the latter is the true view—in other words, that the right to pay a sum due by the contractor to the tradesman appointed by the architect is an exceptional right, which may be very embarrassing to the contractor in certain circumstances. I think, therefore, that the first part of cl. 2 should be construed as involving this, that, when a tradesman selected or appointed by the architect for the purpose of the execution of works for which a provisional sum or prime cost amount is included in the contract has executed the work, the railway company has an option either to pay that tradesman direct and to deduct the amount from the certificate or to pay the proper percentage of the whole amount appearing due on the certificate to the contractor. If it takes the latter course and pays the contractor, in my judgment it is too late to claim a right to pay to the tradesman direct the sum due to the tradesman included in the certificate, meaning thereby the sum due on the certificate less any sum retained by the building owner. The effect of the payment to the contractor, in my opinion, is an election not to exercise the right to pay the tradesman direct to the extent of the percentage due to the tradesman paid to the contractor.
>
> There remains the question of what is to happen with regard to the amount retained by the railway company. In my opinion, my decision does not preclude the railway company from applying a proper part of the retention moneys in paying that part of the amount payable to the tradesman which has not been paid to the contractor on the original certificate, which included that amount.

It seems to me that that judgment covers this point, and respectfully I agree with it. A condition which enables the building owner to pay someone other than the contractor must be strictly construed. If it is open to the architect to issue a certificate to the building owner covering the amount due to a specialist, and thereafter to issue a certificate to the specialist covering the same amount, and if it is open to the building contractor to act on such certificates, indescribable confusion might be caused. It must be clear from the terms of the contract that the parties have so agreed before any such right can be established. I am wholly unable to find that they have so agreed, or that there was any right in the architect to issue a certificate to a subcontractor in respect of an amount already covered by a certificate issued to the main contractor.

Mr. Pritchard argued that, if the certificate issued to the subcontractor were not a good certificate, there would be no certificate in existence, and the plaintiffs could not recover anything. I do not regard that as sound. A dispute having arisen between the parties, it was for the arbitrator to determine their rights, which he has done, stating his award in the form of a special case. Nor do I think that there is any substance in Mr. Pritchard's further point, that the plaintiffs are unable to take advantage of the "election" point as they have not fully paid their subcontractor. Mr. Maxwell Fyfe's remaining point is that, prior to the issue of any certificates to subcontractors, a dispute had arisen between the parties to the contract, and that it was for the arbitrator then to deal with that dispute, and no certificate issued by the architect thereafter was of any effect. He referred me to the decision of the Court of Appeal in *Lloyd Bros.* v. *Milward* (3). Mr. Pritchard accepts the position that a dispute had arisen before the issue of the certificates to subcontractors, and indeed that is clear from the agreed statement of facts, and from the defendants' affidavit in support of the application for a stay, but he argues that, if there is no certificate, the plaintiffs cannot recover. It seems to me that the position is that condition No. 32 applies, and that it is for the arbitrator to decide the rights of the parties, subject, of course, to their right to ask him to state his award in the form of a special case.

A dispute had arisen between the parties, and, on the decision of the Court of Appeal in *Lloyd Bros.* v. *Milward* (3), it was not open to the architect to give further certificates. If he could do so in the present case, he would be determining the very point on which the dispute had arisen. He would indeed be determining a difficult question of law. The parties were at issue. The defendants knew that the plaintiffs' solicitors were about to issue a writ, and, on the very day on which the writ was issued, the architect gave certificates to some subcontractors, and gave them to others at a later date. I do not consider that those certificates have any effect in law. They cannot be regarded as valid certificates, nor as valid directions to the defendants to pay the subcontractors. The defendants have not in fact paid them, but, by arrangement with the subcontractors, they await the result of this litigation.

Solicitors: *Lightbounds, Jones & Co.*, agents for *Owen, Dawson & Wynn-Evans*, Liverpool (for the plaintiffs); *Hamlins, Grammer & Hamlin*, agents for *Thompson, Rigby & Co.*, Birkenhead (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

KNIGHTSBRIDGE ESTATES TRUST, LTD. *v.* BYRNE AND OTHERS.

[Chancery Division (Luxmoore, J.), **January 13, 14, 18, March 1, 2, 3, April 13, 1938.**]

Mortgage—Mortgage by company—Principal repayable by instalments over a period of 40 *years—Postponement of redemption—Clog on equity—Rule against perpetuities—Whether mortgage valid as a debenture—Companies Act,* 1929 (*c.* 23), *s.* 74.

An estate company borrowed a sum of £310,000 from an insurance company, and as security mortgaged to the lenders property consisting of 75 houses, 8 shops and a block of flats. It was a term of the mortgage that the principal should be repaid by 80 half-yearly instalments spread over a period of 40 years. The mortgagees' remedies became immediately exercisable if the mortgagors should sell the equity of redemption without the consent of the mortgagees. There was no power under which the mortgagors could sell any one of the properties mortgaged free from the mortgage. The mortgagors were restrained from granting leases for more than three years without the consent of the mortgagees. The term for repayment was suggested by the A mortgagors. In this action the mortgagors claimed that they were entitled to redeem the mortgaged property after the expiration of six months' notice upon their paying to the lenders the principal, together with interest and costs. It was contended that a mortgage for a term of 40 years was not void as being a clog on the equity of redemption, and that, in the present case, the mortgagors, being a company, were B not entitled to rely upon the equitable principle by reason of the Companies Act, 1929, s. 74. It was also contended that the mortgage deed infringed the rule against perpetuities :—

HELD : (i) the mortgagors were not entitled, upon the construction of the mortgage deed, to repay the whole mortgage debt at any time. The bargain was that repayment was to be made by the stated instalments, and not otherwise.

C (ii) the postponement of redemption for 40 years, having regard to the provisions of the mortgage deed, was unreasonable, and a clog upon the equity of redemption.

(iii) the rule against perpetuities is inapplicable to mortgages.

(iv) the mortgage was not a debenture within the meaning of the Companies Act, 1929, s. 74.

D [**EDITORIAL NOTE.** This case considers a point that has been much discussed since the practice of providing for the repayment of mortgage advances by instalments has become so common. It is clear that the number of instalments may be spread over such a length of time as to make the mortgage practically irredeemable, with the result that there is a clog on the equity, and that is the decision here. It is also held that the rule against perpetuities has no application whatsoever E to mortgages.

AS TO CLOG ON THE EQUITY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 366-369, paras. 460-464 ; and FOR CASES, see DIGEST, Vol. 35, pp. 352-354, Nos. 946-962.

AS TO MORTGAGES AND THE RULE AGAINST PERPETUITIES, see HALSBURY, Hailsham Edn., Vol. 25, pp. 160, 161, paras. 274-276.]

F

Cases referred to :

(1) *Kreglinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.*, [1914] A.C. 25 ; 35 Digest 241, *20* ; 83 L.J.Ch. 79 ; 109 L.T. 802.

(2) *Re Hollis' Hospital Trustees & Hague's Contract*, [1899] 2 Ch. 540 ; 37 Digest 72, *133* ; 68 L.J.Ch. 673 ; 81 L.T. 90.

G (3) *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535 ; 37 Digest 98, *336* ; *sub nom. Re Ashforth's Trusts, Ashforth* v. *Sibley*, 74 L.J.Ch. 361 ; 92 L.T. 534.

(4) *Roe d. Hunter* v. *Galliers* (1787), 2 Term Rep. 133 ; 37 Digest 73, *135*.

(5) *Teevan* v. *Smith* (1882), 20 Ch.D. 724 ; 35 Digest 301, *509* ; 51 L.J.Ch. 621 ; 47 L.T. 208.

(6) *Biggs* v. *Hoddinott, Hoddinott* v. *Biggs*, [1898] 2 Ch. 307 ; 35 Digest 356, H *993* ; 67 L.J.Ch. 540 ; 79 L.T. 201.

(7) *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620 ; 35 Digest 301, *510* ; 79 L.J.Ch. 360 ; 74 J.P. 154.

(8) *Fairclough* v. *Swan Brewery Co., Ltd.*, [1912] A.C. 565 ; 35 Digest 353, *958* ; 81 L.J.P.C. 207 ; 106 L.T. 931.

(9) *Davis* v. *Symons*, [1934] Ch. 442 ; Digest Supp. ; 103 L.J.Ch. 311 ; 151 L.T. 96.

(10) *British India Steam Navigation Co.* v. *Inland Revenue Comrs.* (1881), 7 Q.B.D. 165; 6 Digest 500, *3172*; 50 L.J.Q.B. 517; 44 L.T. 378.
(11) *Levy* v. *Abercorris Slate & Slab Co.* (1887), 37 Ch.D. 260; 7 Digest 31, *156*; 57 L.J.Ch. 202; 58 L.T. 218.
(12) *Edmonds* v. *Blaina Furnaces Co.*, *Beesley* v. *Blaina Furnaces Co.* (1887), 36 Ch.D. 215; 7 Digest 31, *155*; 56 L.J.Ch. 815; 57 L.T. 139.
(13) *Speyer Brothers* v. *Inland Revenue Comrs.*, [1908] A.C. 92; 6 Digest 24, *136*; 77 L.J.K.B. 302; 98 L.T. 286.
(14) *Re Cuban Land Co.*, [1921] 2 Ch. 147; 10 Digest 782, *4896*; 90 L.J.Ch. 440; 125 L.T. 792.
(15) *Norfolk* (*Duke*) v. *Howard* (1683), 1 Vern. 163; 37 Digest 76, *175*; *revsd. on other grounds*, *Norfolk* (*Duke*) v. *Howard* (1685), 1 Vern. 164.
(16) *London & South Western Ry. Co.* v. *Gomm* (1882), 20 Ch.D. 562; 37 Digest 79, *195*; 51 L.J.Ch. 530; 46 L.T. 449.
(17) *Re Frost*, *Frost* v. *Frost* (1889), 43 Ch.D. 246; 37 Digest 72, *130*; 59 L.J.Ch. 118; 62 L.T. 25.
(18) *Re Da Costa*, *Clarke* v. *Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337; 37 Digest 73, *134*; 81 L.J.Ch. 293; 106 L.T. 458.
(19) *Re Tyrrell's Estate*, [1907] 1 I.R. 292; 37 Digest 117, case *481 iv.*
(20) *Wood* v. *Drew* (1864), 33 Beav. 610; 37 Digest 60, *46*.
(21) *Morgan* v. *Davey* (1883), 1 Cab. & El. 114; 37 Digest 92, *288*.
(22) *Noakes & Co., Ltd.* v. *Rice*, [1902] A.C. 24; 35 Digest 241, *19*; 71 L.J.Ch. 139; 86 L.T. 62.
(23) *Gilbert* v. *Gilbert & Boucher*, [1928] P. 1; Digest Supp.; 96 L.J.P. 137; 137 L.T. 619.
(24) *Bradley* v. *Carritt*, [1903] A.C. 253; 35 Digest 354, *971*; 72 L.J.K.B. 471; 88 L.T. 633; *revsg.* S.C., [1901] 2 K.B. 550.
(25) *Re Fortesque's Estate*, [1916] 1 I.R. 268; 35 Digest 356, case *l*.
(26) *Brown* v. *Cole* (1845), 14 Sim. 427; 35 Digest 360, *1027*; 14 L.J.Ch. 167; 5 L.T.O.S. 2.
(27) *Bovill* v. *Endle*, [1896] 1 Ch. 648; 35 Digest 362, *1045*; 65 L.J.Ch. 542.
(28) *West Derby Union* v. *Metropolitan Life Assurance Society*, [1897] A.C. 647; 35 Digest 219, *457*; 66 L.J.Ch. 726; 77 L.T. 284; *affg.* S.C. *sub nom. West Derby Union Guardians* v. *Metropolitan Life Assurance Society*, *West Derby Union Guardians* v. *Priestman*, [1897] 1 Ch. 335.
(29) *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, [1912] A.C. 52; 10 Digest 781, *4890*; 81 L.J.Ch. 137; 105 L.T. 683; *revsg.* S.C., [1910] 2 Ch. 502.
(30) *Stanley* v. *Leigh* (1732), 2 P.Wms. 686; 44 Digest 1265, *10925*.
(31) *Wainwright* v. *Miller*, [1897] 2 Ch. 255; 37 Digest 93, *293*; 66 L.J.Ch. 616; 76 L.T. 718.
(32) *Howel* v. *Price* (1715), 1 P.Wms. 291.
(33) *Teulon* v. *Curtis* (1832), 1 You. 610; 35 Digest 271, *276*; 2 L.J.Ex.Eq. 17.
(34) *Worthing Corpn.* v. *Heather*, [1906] 2 Ch. 532; 37 Digest 81, *212*; 75 L.J.Ch. 761; 95 L.T. 718.
(35) *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12; 37 Digest 80, *200*; 79 L.J.Ch. 150; 101 L.T. 865.

ACTION by mortgagors of real estate for a declaration that they were entitled to redeem the mortgaged property after the expiration of six months' notice and the payment of principal, interest and costs, notwithstanding that it was a term of the mortgage deed that the principal should be repaid by 80 half-yearly instalments spread over a period of

40 years. The material provisions of the mortgage deed are stated in the judgment.

F. R. Evershed, K.C., and *J. H. Stamp* for the plaintiffs.

J. M. Gover, K.C., and *Wilfrid M. Hunt* for the defendants.

Evershed, K.C.: There is no case in which so long a period as 20 years has been permitted. By virtue of the Companies Act, 1929, s. 74, irredeemable debentures are permissible. This document is not a debenture, in the proper sense of that term, at all. The terms of the document are against the recognised principles of equity, which forbid a clog on the right of a mortgagor to redeem. Prior to the end of the seventeenth century, no perpetuity rule, nor anything in its nature, was applied to mortgages. So far as a legal condition is concerned, the courts, in modern times, would be bound to say that the modern rule against perpetuities applied. Equity attached to a mortgage a right to redeem after the legal right had gone. After a decision of Lord Hardwicke in 1737, the equitable right to redeem became regarded as an estate in the land. An equity to redeem is an interest in the land, and that interest in the land must vest within the perpetuity rule. There are strong grounds for saying that, in modern times, both legal conditions and equitable relief fall within what is called the modern rule against perpetuities. The foundation of the modern rule against perpetuities is to be found in the decision of Lord Nottingham, L.C., in *Norfolk* (*Duke*) v. *Howard* (15). All future interests, whether in real or personal estate, must vest absolutely within a certain limited time. There are certain exceptions, such as a lease between landlord and tenant. In the present case, the time fixed by the legal condition is 40 years, and the estate in equity arises after 40 years. The mortgagee, on the happening of certain events, could sell the property free from any interest of the mortgagor, and thus create a new fee simple. That is an estate in the land analogous to the revocation of a power of appointment. Until after the expiration of 40 years, the mortgagor cannot get rid of that power, and is not able to dispose of that property free from that liability. The case must be regarded from the point of view of the mortgagor. [Counsel referred to *Norfolk* (*Duke*) v. *Howard* (15), *London & South Western Ry. Co.* v. *Gomm* (16), *Re Frost, Frost* v. *Frost* (17), *Re Ashforth, Sibley* v. *Ashforth* (3), *Re Hollis' Hospital Trustees & Hague's Contract* (2), *Re Da Costa, Clarke* v. *Church of England Collegiate School of St. Peter* (18), *Re Tyrrell's Estate* (19), *Wood* v. *Drew* (20), *Morgan* v. *Davey* (21).]

Stamp, following on the same side: The law requires that a mortgage shall be redeemable, and redeemable within a reasonable time. Where hardship would arise as a consequence of the postponement of the time for redemption, the period must be looked at with suspicion. Forty years is an unreasonable time to wait, so far as the mortgagor is concerned. The mortgagee has always a power of transferring his rights, and there is no hardship in his case. In the present case, there is a block of 90 separate properties, which a mortgagor would almost certainly require to deal with separately in the course of 40 years. He is, however, not allowed to do so, but is prevented by this mortgage from dealing with any of them separately. The mortgagor is not able to alter any of the houses in any way, because, by so doing, he may be technically committing waste, and thus the mortgagee could at once sell. The paying off of the mortgage debt by instalments very largely cancels the mutuality of the case, as these payments would reduce the mortgage debt, in course of time, to a very small proportion of its original value. If this had been a single house, the position would have been more favourable to the mortgagor. The hardships largely arise because 90 houses are tied in one mortgage, so that the mortgagor can deal with one of them only on onerous terms. That is a matter which must have been within the contemplation of both parties. The word mortgage is not a term of art, either in commerce or in law, and there is no question as to its meaning. Neither in the law courts nor elsewhere has an ordinary mortgage of freeholds been referred to as a debenture. If the law has been altered by the 1929 Act, it can only be by the interpretation clause—namely, sect. 380. It is plain, however, that the word debenture does not include an ordinary mortgage of freeholds with an ordinary proviso for redemption. A mortgage can only be of one single thing. The first legal mortgage of a freehold to an individual is, in its nature, singular, and cannot be plural. Debentures are, in their nature, capable of multiplication. In the present case, the parties cannot have looked upon this deed as one intended to govern their rights for 40 years. [Counsel referred to *Teevan* v. *Smith* (5), *Noakes & Co., Ltd.* v. *Rice* (22), *Levy* v. *Abercorris Slate & Slab Co.* (11), *Gilbert* v. *Gilbert & Boucher* (23), *Biggs* v. *Hoddinott* (6), *Bradley* v. *Carritt* (24), *Morgan* v. *Jeffreys* (7), *Fairclough* v. *Swan Brewery Co., Ltd.* (8), *Davis* v. *Symons* (9), *Re Fortesque's Estate* (25), *British India Steam Navigation Co.* v. *Inland Revenue Comrs.* (10), *Edmonds* v. *Blaina Furnaces Co.* (12).]

Gover, K.C.: The offer of this particular term was made by the mortgagor. There is no equitable principle, in the present case, which would enable the mortgagor, in derogation of his legal contractual obligation, to pay off the mortgage at an earlier time than that which was agreed. Also, in the present case, the document was a debenture within the meaning of the Companies Act, 1929, s. 74. There was complete mutuality, and the provision regarding the time for redemption is as much in favour of one party as it is in favour of the other. In no conceivable circumstances can there be any question of a clog upon the equity of redemption. [Counsel referred to *Brown* v. *Cole* (26), *Bovill* v. *Endle* (27), *West Derby Union* v. *Metropolitan Life Assurance Society* (28), *Kreglinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.* (1), *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.* (29), *Re Fortesque's Estate* (25), *Davis* v. *Symons* (9) and *Biggs* v. *Hoddinott* (6).] The policy of the rule against perpetuities appears from the opinion of

Lord Nottingham, L.C., in *Norfolk* (*Duke*) v. *Howard* (15), and the point is also expressed very shortly by Jekyll, M.R., in *Stanley* v. *Leigh* (30). The rule has been held not to apply to estates tail, to limitations in fee of estates tail, to contracts merely as contracts, although they might involve certain restrictions with regard to land, to covenants for renewal A of leases, however long, to negative covenants in restriction of the owner's rights in fee simple, or to conditional rights of entry in defeasance of a term of years, and it has never been suggested that there is such a right in the present case. In all the cases it will be found that they have been regarded as not being within the mischief which the rule B was intended to prevent. With regard to mortgages, exactly the same thing applied. In every mortgage a mortgagor has an estate in the land, and an equitable right to redeem. Since 1925, he has had more. From the time, however, when equity first recognised the right to redeem, it was an equitable estate. It was not an equity of redemption, although C often termed such. It was an estate recognised in equity, and it could be assigned or bequeathed. It is a principle of equity that a mortgage is always redeemable. It is redeemable at common law at, and not before, the contractual date. Equity allows redemption at any time afterwards. That is contrary to the rule against perpetuities, and it is hardly to be D conceived that equity would be disregarding its own rule. It has never been suggested that the powers given to a mortgagee were confined within the limits of the perpetuity rule. In none of the cases in which the question of an undue period for redemption has arisen has anybody suggested that it could be interpreted as offending the rule against E perpetuities. [Counsel referred to *Kreglinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.* (1), *Wainwright* v. *Miller* (31), *Howel* v. *Price* (32), *Teulon* v. *Curtis* (33), *Worthing Corpn.* v. *Heather* (34), *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.* (35).]

Stamp, in reply, referred to *Teevan* v. *Smith* (5).

F

Luxmoore, J.: Knightsbridge Estates Trust, Ltd., was incorporated in 1926, with limited liability, under the Companies Acts, 1908 to 1917. It has, since its incorporation, carried on, and still carries on, business in connection with the acquisition, ownership and management of real G estate in London. In 1931 it borrowed from the trustees of the Royal Liver Friendly Society the sum of £310,000 upon terms set out in a mortgage deed dated Nov. 6, 1931. It was a term of that deed that the £310,000 should be repaid, with interest at 5¼ per cent. per annum, by 80 half-yearly instalments spread over a period of 40 years.

H On Feb. 25, 1937, the plaintiff company instituted this action against the defendants, Alfred Byrne, Thomas Hamblett and Joe Gledhill, as trustees of the Royal Liver Friendly Society, claiming a declaration that, notwithstanding the provision for repayment by instalments, the plaintiff company is entitled, after the expiration of six months' notice, to redeem the mortgaged premises upon payment to the defendants of the principal money secured by the mortgage, with interest down to the date of redemption and the proper mortgagees' costs.

The action came before me at the beginning of these sittings, and, after hearing argument by counsel for the respective parties, I reserved judgment. On looking into the matter, I found in Gray on the Rule against Perpetuities certain statements which suggested that there was a serious doubt as to whether all or any of the provisions of the mortgage deed infringed that rule. I accordingly directed the case to be restored to the list for further argument. The further hearing took place at the beginning of last month, and occupied more than two full days. There is no dispute of fact, the questions which arise being purely questions of law.

The first question is whether, on the true construction of the mortgage deed, the plaintiff company is entitled to give to the defendants six calendar months' notice of its intention to pay off the principal moneys remaining on the security of the mortgage deed, and to repay such moneys to the defendants, with interest down to the actual date of payment. If the answer to this question be in the affirmative, no other question arises. If, however, the answer be in the negative, then the following questions arise: (*a*) Is the provision in the mortgage deed postponing the right of redemption thereunder for a period of 40 years void as infringing the rule against perpetuities? (*b*) If the answer to the last question is in the negative, are the provisions of the mortgage deed so unreasonable as to constitute a clog on the equity of redemption, and thus to entitle the plaintiff company to redeem the mortgaged premises notwithstanding the provisions of the mortgage deed? (*c*) Is the mortgage deed a debenture within the meaning of the provisions of the Companies Act, 1929, s. 74, and, if it is, what is the effect of those provisions with regard to the preceding questions?

I propose to deal first with the question of construction. The mortgage deed of Nov. 6, 1931, is expressed to be made between the plaintiff company of the one part and the defendants, who are described in the deed as the trustees of the Royal Liver Friendly Society, of the other part. It contains two recitals, the first being to the effect that the plaintiff company is seised of the freehold properties particularised in the schedule to the deed. These properties comprise 75 houses, 8 shops and a block of flats in the city of Westminster, situate respectively in Chesham Place, Chesham Mews, Lowndes Street, Motcomb Street, West Halkin Street, William Street and William Mews. The second recital is to the effect that the defendants had agreed to advance to the plaintiff company the sum of £310,000 upon having repayment of that sum with interest thereon secured as provided by the mortgage deed. By the first clause of the *testatum*, the plaintiff company, in consideration of the payment to it by the defendants of the sum of £310,000, covenants with the defendants to pay to them the sum of £310,000, with interest at the rate of £5¼ per cent. per annum, by 80 half-yearly instalments of principal and interest combined of £9,308 14*s.* 3*d.*, each less income tax at the rate for the time being in force on such part thereof as represents interest to the due date of payment of such instalment on the principal sum for the time being outstanding under the mortgage deed. The instalments are payable on May 6 and Nov. 6 in each year, the first instalment being payable under the deed on May 6, 1932, and the last on Nov. 6, 1971. The deed contains a proviso that, if default shall be made by the plaintiff company in payment of any one of the half-yearly instalments of principal and interest, on the appointed day, or within 14 days afterwards, the whole of the principal for the time being secured by the deed, with interest thereon to date at the rate of £5¼ per cent. per annum, should become immediately payable by the plaintiff company, and be recoverable forthwith by the defendants by all or any of the remedies conferred on them by statute or otherwise.

By cl. 2 of the *testatum*, the plaintiff company demised to the defendants the properties already mentioned for the term of 3,000 years from Nov. 6, 1931, without impeachment of waste, subject to the proviso that, if the plaintiff company should pay to the defendants the sum of £310,000, together with interest thereon at the rate mentioned by the instalments at the respective times and in manner specified in the covenant by the plaintiff company contained in the first clause, and should also pay the proper costs, charges and expenses of the defendants as mortgagees, together with interest thereon at the same rate, the defendants would, at the request of the plaintiff company, surrender the said properties to the plaintiff company, or to the persons deriving title under it, or as it or they might direct. For the purpose of answering the first question, it is unnecessary to refer to any of the other provisions of the mortgage deed except those to be found in cl. 3. This clause contains a covenant by the defendants that, if the plaintiff company should pay to the defendants the sum of £310,000, with interest thereon at the appropriate rate by the instalments of principal and interest combined on the half-yearly dates and in the manner thereby provided, or should pay the same within 14 days next after the day appointed for payment, and if there should not have been any breach of any obligation, statutory or otherwise, binding on the plaintiff company, or of any of the covenants, express or implied, in the mortgage, and on its part to be observed and performed, then the defendants should accept payment of the said sum of £310,000, and interest by the instalments and in the manner aforesaid, and would not require payment of such principal money otherwise than by such instalments.

Mr. Evershed argued, on behalf of the plaintiff company, that, on the true construction of the mortgage deed, the plaintiff company was entitled to repay to the defendants the principal money secured at any time. He based his argument mainly on the absence of any covenant by the plaintiff company that it would not repay the loan except by the instalments specified, although there was a covenant by the defendants that, if the plaintiff company complied with the provisions of the mortgage deed, they would not require payment otherwise than by the agreed instalments. In considering this question, it must be remembered that the answer depends on the interpretation of the language of the deed, and that no equitable doctrine relating to mortgages can enter into the consideration of that interpretation. It is, I think, settled law that, if A. agrees with B., in consideration of a loan from B. to A., to repay that loan with interest on a fixed future date, B. cannot sue A. for repayment of the loan before the arrival of that date, nor can A. compel B. to accept repayment of it before that date has arrived. It can make no difference to the legal effect of such a covenant if the deed containing it also contains a charge to secure its fulfilment. In Fisher and Lightwood's Law of Mortgages, 7th Edn., p. 587, it is stated that :

> a mortgage is usually made redeemable at the expiration of six months from its date, and where a time is fixed for redemption it does not become redeemable until that time has arrived ; the mortgagee may take objection to an action to redeem at an earlier day, even although the mortgagor tenders interest during the whole intervening period.

I was referred to a number of authorities in support of these statements, and those authorities appear to me to afford complete support for them. In *Kreglinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.* (1), Lord Parker of Waddington said, at p. 47 :

> Taking the simple case of a mortgage by way of conveyance with a proviso for reconveyance on payment of a sum of money upon a specified date, two events might happen. The mortgagor might pay the money on the specified date, in which case equity would specifically perform the contract for reconveyance. On the other hand the mortgagor might fail to pay the money on the date specified for that purpose. In this case the property conveyed became at law an absolute interest in the mortgagee. Equity, however, did not treat time as of the essence of the transaction, and hence on failure to exercise what may be called the contractural right to redeem there arose an equity to redeem, notwithstanding the specified date had passed. Till this date had passed there was no equity to redeem, and a bill either to redeem or foreclose would have been demurrable.

In the present case, the bargain between the parties as disclosed by the mortgage deed is to repay the principal sum and interest by instalments spread over 40 years. To compel the defendants to receive in one sum the principal secured, at any time the plaintiff company might desire to repay it, would be to deprive the defendants of the benefit of the agreement made by them with the plaintiff company, and would be contrary to the tenor of the deed. I can see no ground for holding that, on the true construction of the mortgage deed, the plaintiff company is entitled to pay off the mortgage money on giving six months' notice, and I therefore hold that the first question must be answered in the negative.

It is therefore necessary to consider the other questions formulated at the beginning of this judgment. The first of these is whether the postponement of the right of redemption under the mortgage deed offends against the rule against perpetuities. It is certainly more difficult to answer than the question of construction is. So far as I have been able to discover, the question has not been the subject of any reported decision, nor have I been able to find any express reference to it in any of the numerous text-books devoted to mortgages and to the rule against perpetuities other than Mr. Gray's well-known treatise A and in the articles on perpetuities and mortgages respectively in HALSBURY'S LAWS OF ENGLAND. GRAY ON THE RULE AGAINST PERPETUITIES, 3rd Edn., devotes a chapter to mortgages: see pp. 460-463. In it, the author states that, when the condition of a mortgage must be fulfilled, if at all, within 21 years after lives in being, no question of B remoteness can arise as to the legal rights of the parties. The mortgagee has the fee simple subject to a condition, any rights under which must begin within the limits required by the rule against perpetuities. If the condition is such that the mortgagor's right of re-entry may not arise until a period beyond the limits of the rule, then such right would seem C to be too remote. The foregoing statements are confined to the rights at law of the mortgagor and mortgagee. With regard to their rights in equity, the author points out that, when the condition of a mortgage must be fulfilled, if at all, within 21 years after lives in being, no question of remoteness can arise as to the equitable rights of the parties. He then D deals with the mortgagee's power of sale as conferred by the mortgage, and points out that, although it can be exercised at any time more than 21 years after lives in being, it is merely a remedy given to enforce a right which the law would otherwise enforce for him, and the power is therefore not invalid. He expressed the opinion that, if the condition E of the mortgage is such that failure to fulfil it by the mortgagor may occur more than 21 years after lives in being, and if no lives are mentioned more than 21 years after the date of the mortgage, the mortgagee's rights, on default by the mortgagor, to have the land comprised in the mortgage applied in discharge of the debt are invalid. He instances F a hypothetical case where the condition of the mortgage is to pay the mortgage debt in 30 years, and states the opinion that in such a case the condition would be too remote, and the mortgagee's right would be invalid.

These statements are made with regard to a mortgage of freehold G property in fee simple, and do not purport to deal with the case where the mortgage security is a term of years. Mr. Evershed, in his argument, however, claimed that there is no difference in principle between the two cases, so far as concerns the mischief against which the rule against perpetuities is directed. It must, however, be borne in mind that—in H the courts of first instance, at any rate—it has been decided that a common law condition in defeasance of an estate in fee simple capable of taking effect outside the perpetuity limits is void: *Re Hollis' Hospital Trustees & Hague's Contract* (2) and *Re Ashforth, Sibley* v. *Ashforth* (3). It must also be borne in mind, not only that there has been no decision that a condition in defeasance of a term of years is within the rule, but also that the Real Property Commissioners in their Third Report stated with regard to these matters, at p. 43, that:

> the rule of law against perpetuities applied in its origin to estates created by way of use or by devise and we have treated it (as in truth it is) as principally applicable to future contingent estates and interests but a perpetuity may be effected without the existence of any contingent estate by the creation of a long term of years with a proviso for determining it on the happening of an event not within the limits of the rule; for, in such a case, although the reversion expectant on the term is vested, and may remain vested, yet the acceleration of its taking effect in possession may produce the same effect as the limitation of a future contingent estate, and it is obvious that, by means of successive terms and successive provisoes of this kind, a settlement might be made under which land would continue inalienable for a much longer period than the rule in question would permit. We are not aware of any case where interests of this kind created by a common law assurance have been held invalid under the rule now under consideration; but, as the mischief in such a case must be the same as in the more ordinary cases of attempts to create perpetuities, we do not hesitate in recommending that such cases shall be brought within the operation of the rule, taking care to except the case of landlord and tenant, as already pointed out with reference to conditions and covenants. The difference between these and future limitations is that here it must be declared, not that the future interest to arise on a remote event shall be void, but that the term made determinable on a remote event shall become absolute. It will, of course, be necessary to except estates tail.

This is a clear statement that, at the date of the report, a condition in defeasance of a term of years was regarded as valid. There are no subsequent decisions in disagreement with this view. In CHALLIS ON REAL PROPERTY, 3rd Edn., p. 186, it is stated (and the passage is by the author himself):

> the main exceptions out of the operation of the rule seem to be as follows: (1) Conditions in defeasance of a term of years. It has never been suggested that such conditions are within the scope of the rule unless (which hardly seems to be the case) a loose remark thrown out *obiter* by BULLER, J., in *Roe d. Hunter* v. *Galliers* (4), at p. 140, amounts to such a suggestion. Since such conditions have come almost daily before the courts during some centuries, there could hardly be a stronger proof that their validity is not open to question.

In face of the statement of the Real Property Commissioners and the passage from CHALLIS ON REAL PROPERTY to which I have referred, and in the absence of any subsequent decision to the contrary, I hold that the condition in defeasance of the term of years created by the mortgage deed does not infringe the perpetuity rule, and is valid. I have dealt with this question because it was argued fully before me, but I doubt whether it was necessary to answer it, because I have come to the conclusion that mortgages are exempt from the perpetuity rule.

In the article on perpetuities in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 25, p. 160, the opinions expressed by GRAY ON THE RULE AGAINST PERPETUITIES, and already quoted by me, are discussed, and it is stated that:

> whatever be the true foundation of their exemption, mortgages are undoubtedly exempt from the rule.

As I have already pointed out, apart from the two articles in HALSBURY'S LAWS OF ENGLAND and GRAY ON THE RULE AGAINST PERPETUITIES, there is no recognised text-book on mortgages, or on the rule against perpetuities, which deals with the question, or suggests that the con-

dition of a mortgage falls within the mischief of the rule. Mr. Gover, on behalf of the defendants, relies on this as affording strong support for the view that mortgages fall within the numerous exceptions to the rule, of which perhaps the principal are limitations in remainder after an estate tail, covenants for renewal in leases, however long, rights
A of re-entry, and other conditions of defeasance of a term of years granted by a landlord to a tenant. Mr. Gover pointed out, and I agree with his argument, that to apply the rule to mortgages would be inconsistent with the history and principles of redemption of a mortgage. At the date of the Report of the Real Property Commissioners, a species of
B contract was in force which was commonly known as a Welsh mortgage. The ingredients of such a contract were a debt due and an estate as a security for repayment, but it differed from an ordinary mortgage contract in that the mortgagee received the rents and profits without any liability to account until the principal money was paid off, but there
C was no remedy to enforce payment of the debt. In such a case, the right to redeem subsisted in perpetuity, and the mortgagee could neither compel redemption nor obtain foreclosure. Many cases in relation to such a contract are to be found in the books (examples of which were cited during the argument), but in none of them was it ever suggested
D that the rule against perpetuities applied. This type of contract ceased to be effected, not because of any question as to its validity from the point of view of the rule against perpetuities, but because of the usury laws: see POWELL ON MORTGAGES, 6th Edn., p. 374.

An ordinary mortgage is, as already stated, redeemable at, and not
E before, the contractual date. When that date is past, equity allows redemption at any time thereafter. There is no time limit. This would appear, on the face of it, to be contrary to the rule against perpetuities, for possibilities, not probabilities, have to be considered in the application of the rule. Again, in the case of a mortgage to secure a principal
F sum, without any date of payment being specified, the same position arises. In the case of a transaction not in form a mortgage, but which is recognised in equity as such, the right of redemption is unlimited in point of time.

Moreover, the powers usually given to a mortgagee are not confined
G within the perpetuity limits. Yet it cannot be contended that such powers are void unless they are so confined. In LEWIS ON PERPETUITIES, at p. 560, it is stated that notice must be taken of a class of unlimited powers

> which, on account of their being always subject to be defeated by the beneficial
> H owner (although not in consequence of any express reservation of consent), or rather on account of the nature of the object of the power presenting a guarantee against undue remoteness in its execution, are clearly unaffected by any objection on that head. The powers in question are the common powers of sale reserved to mortgagees, and their heirs, or executors and administrators, as additional security for the repayment of the principal money and interest. These powers unquestionably do not operate as a clog upon the alienation of the property. . . .

It is to be observed that Gray himself says that, if the question of the validity of a mortgage conditioned to be redeemed at a date too remote to fall within the rule against perpetuities should come before the courts,

> it is to be hoped that they will frankly declare it an exception to the rule and not by attempting to reconcile them with the rule bring confusion into the rule itself.

In this connection, it is not immaterial to consider what the consequences would be if a mortgage in fee simple, subject to a proviso for reconveyance at the date fixed for repayment of the principal, which is outside the perpetuity period, should be held to be void. As I have already stated, the covenant to repay the mortgage debt at the date fixed is valid. The covenant to reconvey at the fixed date is valid as a covenant, although that date is outside the perpetuity limit. If the provision for reconveyance binding the land in the hands of the mortgagee is void, and the corresponding provision entitling the mortgagor to require a reconveyance on that date is also void, the mortgagee is left with the fee simple, without any liability in law to reconvey or any right of redemption at all. There can be no doubt that in such a case equity would enforce the mortgagor's right to redeem when the debt was repaid, although the repayment was made at the date fixed. To allow the mortgagor to repay the principal secured by the mortgage before the date fixed by the covenant for repayment would be to disregard the bargain between the parties, and to make an entirely new bargain, although the original covenant is still binding on the mortgagor. If this reasoning is applied to the present case (and, since the passing of the Law of Property Act, 1925, every mortgage which is in form effected by a conveyance of the fee simple is to be deemed to be a mortgage by demise for a term of 3,000 years), and the proviso for the cesser of the term is considered to be void, the original term remains, and there is a statutory proviso for its cesser under the provisions of sect. 116 of the 1925 Act, which then comes into operation. It is difficult to see what there is in such a case to deprive a mortgagee of the term of years, except in accordance with the original bargain. These considerations lead me to the conclusion that the rule against perpetuities is inapplicable to mortgages.

In dealing with the last question, I have purposely refrained from any reference to the question as to whether or not the period of 40 years fixed for repayment of the principal sum secured is a clog on the equity of redemption, because this question is one which requires to be dealt with separately. It is stated in COOTE ON MORTGAGES, 9th Edn., Vol. 1, p. 15:

> It was held under the old law that no condition could be valid which purported to restrict the right of redemption within a limited period as the life of the mortgagor. He may however stipulate that he will not pay off his debt and so redeem his mortgage for a fixed period. But it must be a reasonable period, as, for instance, for five or seven years. "It is an old and well-established practice and a reasonable practice too." But it is otherwise where the period is unreasonable. Therefore a proviso restraining redemption for so long a period as 28 years is always unreasonable and void at least where there is no corresponding restriction preventing the mortgagee from calling in his money.

If this is a correct statement of the law, it appears to me to afford strong support to the view, already expressed by me, that the rule against perpetuities has no application to mortgages. Numerous cases are cited in support of the statement to which I have referred. My attention was called to the majority of them. In *Teevan* v. *Smith* (5) there is a A *dictum* of SIR GEORGE JESSEL, M.R., at p. 729:

> although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years.

ROMER, J., approved of this *dictum* in *Biggs* v. *Hoddinott* (6) in these B terms, at p. 311:

> I take it that what was said by SIR GEORGE JESSEL, M.R., in *Teevan* v. *Smith* (5) is good law, at any rate, so far as I am concerned, and, indeed, I trust good law in whatever court the question may ultimately be raised, namely, that "Although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years."

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In the case before ROMER, J., the period during which redemption was precluded was five years. With regard to it, he said, at p. 311:

> Now, I am of opinion that it is obviously to the advantage of both the mortgagor and mortgagee that such a provision should be enforced. Of course, that does not prevent the court in a proper case from preventing the application of the clause D if it is too large, or there are circumstances connected with the proviso which renders it, in the opinion of the court, unreasonable or oppressive.

In *Morgan* v. *Jeffreys* (7), the period during which redemption of the mortgage was precluded without the consent of the mortgagee was 28 years. The mortgage was in a peculiar form, and contained a number E of provisions which JOYCE, J., criticised adversely, although the mortgage was prepared by the mortgagor's solicitor. He referred to the *dictum* in *Teevan* v. *Smith* (5), to which I have already referred, and to the judgment of ROMER, J., in *Biggs* v. *Hoddinott* (6), and pointed out that in the case before him the provisions for the continuance of the F loan for the period of 28 years were not mutual, the mortgagee being entitled to call in the mortgage debt at any time, although the mortgagor was precluded from redeeming for the fixed period of 28 years, and that other stipulations for the benefit of the mortgagee contained in the mortgage deed were of a severe character, from the mortgagor's point G of view. He accordingly held that the period of 28 years "exceeded all reasonable limit," and he added that he could "not understand how the mortgagor could have been allowed by his solicitor so to fetter himself." The judge made an order in favour of the mortgagor for redemption of the mortgage, notwithstanding the proviso. In *Fairclough* H v. *Swan Brewery Co., Ltd.* (8) the Privy Council held that a mortgagor was entitled to redeem a mortgage of leasehold property which had 20 years to run where the mortgage contained a proviso that the mortgage debt should not be wholly paid off until a date within six weeks of the expiration of the lease, the ground of the decision being that the mortgage was, from the practical point of view, irredeemable.

In *Davis* v. *Symons* (9), EVE, J., held that the mortgagor was entitled to redeem a mortgage although it contained mutual covenants between mortgagor and mortgagee that the principal sum should be allowed to remain on the security of the mortgage for a period of 20 years. The mortgage contained a provision that the mortgagor would not sell the equity of redemption except to a responsible person. EVE, J., said, at A p. 447, that the authorities establish undoubtedly that the mere postponement of the date for redemption for a moderate and reasonable period does not, in the absence of other circumstances, avoid the contract. After calling attention to a number of cases, including *Teevan* v. *Smith* (5), he pointed out that, in *Morgan* v. *Jeffreys* (7), the absence of a reciprocal B covenant on the part of the mortgagee not to call in his money for a like period as was binding on the mortgagor had been regarded as an important consideration in estimating the reasonableness of the fetter imposed on the right to redeem. He said, at p. 448:

> I do not think any of the cases where there is an absence of mutuality assist C very much in determining what is reasonable in cases where both parties are bound to a fixed term. In determining the simple question whether any particular postponement is extravagant and oppressive the absence of a corresponding restraint on the mortgagee must be regarded as an important factor, but in cases where it is not suggested that there has been any over-reaching where there are mutual covenants binding on mortgagor and mortgagee, and where each party may be regarded as of an age and competency to decide what was most beneficial to him- D self, I do not see why one of them should be allowed to escape from his contract merely because the postponement is a long one and, as events have turned out, he would have been better off had he adopted a different attitude at the date of the mortgage. I am not prepared to say that in the absence of other relevant factors the court would, in circumstances such as I have just referred to, regard a period of twenty years as unreasonable; no doubt the longer the suspensory period the more incumbent it is to consider whether there are any provisions in the contract calculated to make the ostensible mutuality more apparent than real. In other E words the question whether the contract is reasonable or not cannot be decided without a full examination of the whole deed.

Later in his judgment he calls attention to the provision with regard to sale of the equity of redemption, and says, at p. 449:

> There is another provision which is certainly not usual in mortgages—I do not F know that I ever saw it myself, but it may be that others with larger experience have seen it. It is no doubt a useful one from the mortgagee's point of view, but must I think hamper the mortgagor to an unreasonable extent. It is a special covenant on the part of the mortgagor whereby he covenanted not to sell the equity of redemption except to a responsible person.

Having regard to these decisions, it is necessary to consider with some particularity the provisions of the mortgage deed of Nov. 6, 1931. In G the first place, the covenant restricting the mortgagor's right of redemption for a period of 40 years is a more severe restriction than any which is to be found in any of the reported cases. In addition to this, the mortgage deed contains a number of unusual provisions. In particular, there is a provision that the mortgagees are to be entitled to H exercise all the powers and remedies conferred upon mortgagees by the Law of Property Act, 1925, among other things if the plaintiff company should sell the equity in the mortgaged hereditaments, or any part thereof, without the written consent of the mortgagees, which consent should not be unreasonably withheld in the case of a respectable and responsible person. This provision is similar to the provision against the sale of the equity of redemption which was present in the mortgage in *Davis* v. *Symons* (9), and was held by Eve, J., to be unreasonable. Further, in the present case the mortgage is so framed that, although the security comprises a large number of separate houses and shops in the city of Westminster, and although the mortgage deed provides for the reduction of the mortgage debt by half-yearly instalments, there is no power in the mortgagor to sell even one of the houses or shops freed from the mortgage, with the result that the mortgagor is prevented from dealing with any part of the mortgaged property otherwise than by a sale of the equity of redemption in whole or any part, although the value of the whole of the property, which at the date of the mortgage was sufficient security for the debt of £310,000, may, at the date when a sale is desired, be far in excess of the amount then secured, having regard to the number of instalments already paid to the mortgagees in respect of the debt. Further, the plaintiff company is precluded from leasing any part of the property comprised in the security for any term in excess of three years without the consent of the mortgagees, while, in the event of the plaintiff company making default in the covenants to repair or insure any part of the property at any time during the 40 years, the mortgagee is entitled to exercise the statutory powers conferred by the Law of Property Act, 1925, although the value of the rest of the property comprised in the security is far in excess of the money remaining due under it at the date of the default. In my judgment, the provisions of the mortgage deed in the present case are far more onerous and unreasonable from the point of view of the mortgagor than are those to be found in the mortgages considered by Joyce and Eve, JJ., respectively, in the cases to which I have referred.

If the mortgage deed of Nov. 6, 1931, had been entered into between individuals, I should have no hesitation in holding that the period during which the mortgagor is precluded from redeeming is, having regard to all the provisions of the deed, unreasonable, and that the mortgagor is entitled to redeem. It is said, however, that, because the mortgagor is a company with limited liability, it is precluded from relying on this ground of objection, and from obtaining any relief in respect of the unreasonableness of the mortgage deed. Reliance is placed on the provisions of the Companies Act, 1929, s. 74, which provides that a condition contained in any debenture or in any deed for securing any debentures, whether issued before or after the commencement of the Act :

> . . . shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

Sect. 380 of the same Act contains a definition of debenture in these terms :

> "Debenture" includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not.

The question is whether the mortgage deed of Nov. 6, 1931, is, on the true construction of the Act of 1929, within this definition. If it is, then the rule that the period of redemption must not be postponed so as to be unreasonable has no application.

The definition in the Act does not appear to be intended to be exhaustive. Apart from it, no precise definition of the word " debenture " is to be found in the books: *British India Steam Navigation Co.* v. *Inland Revenue Comrs.* (10), at pp. 168, 169, 172. The term has been applied to documents of varying form. It is practically, although not exclusively, confined to documents issued by companies. A debenture either creates or acknowledges a debt: *Levy* v. *Abercorris Slate & Slab Co.* (11), at p. 264, and *Edmonds* v. *Blaina Furnaces Co.* (12). It is usually described in the document itself as such, but there is no necessity for this: *British India Steam Navigation Co.* v. *Inland Revenue Comrs.* (10). If the document is described on its face as a debenture, even if it provides no security beyond the acknowledgement of the debt and the promise to pay it, the document is, for the purposes of stamp duty, a debenture, and must be stamped accordingly: *Speyer Brothers* v. *Inland Revenue Comrs.* (13), at p. 95. A debenture may or may not contain a charge or security, and the charge or security may be fixed or floating. In either case, the debenture is frequently termed a mortgage debenture. It may consist of one document alone, or, as is generally the case, it may constitute one of a series of documents ranking *pari passu* in point of priority. Frequently the payment of the money owing on debentures is secured by a trust deed containing a specific charge on property belonging to the company which created the debentures. Speaking generally, the term debenture in the commercial world is used to describe a document issued by a company securing or acknowledging the payment of money, but it would, in my opinion, certainly be unusual for an ordinary mortgage of freehold property to be so described, although, if such a mortgage is executed by a company, it can properly be described as a security of the company. It is necessary to consider whether or not the words " or other security of a company " in the definition section include, as a matter of construction, such a mortgage as that under consideration. To arrive at a conclusion on the point, it is necessary to consider the Act itself, and the history and the circumstances in which sect. 74 and the definition came into being. The subject-matter of sect. 74 was first introduced into the legislative enactments relating to companies by the Companies Act, 1907, s. 14, which was passed for the purpose of removing any doubt as to the validity of debentures issued on the terms that the principal moneys covered thereby were either not repayable or repayable only in certain specified or contingent events, such as, for example, the winding up of the company: *Re Cuban Land Co.* (14), at p. 151. The section is in these words:

> For removing doubts it is hereby declared that a condition contained in any debentures or in any deed for securing debentures, whether issued or executed

> before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

It is to be found in a *fasciculus* of sections numbered 10 to 18 inclusive under the title "Mortgages and Charges." Sect. 10 provides for the A registration of mortgages and charges, and in that section references are to be found to mortgages, charges and debentures. These sections contain provisions with regard to the registration of holders of debentures and the reissue of redeemed debentures. Sect. 14 is expressed to be for the purpose of removing doubts, and is, of course, retrospective. There B was no doubt, at the date when the 1907 Act was passed, that an ordinary mortgage of freehold property was within the mischief of the rule of equity with regard to the postponement of the period of redemption for an unreasonable time, yet the section makes no mention of mortgages or charges, but is confined in terms to debentures.

C It is, I think, impossible to hold that the words "mortgages," "charges" and "debentures" are used in the 1907 Act as interchangeable terms. Indeed, the opening words of sect. 10 of the 1907 Act show clearly that the words are not intended to be used as synonymous. The words to which I refer are:

D

> (1) Every mortgage or charge created by a company after the commencement of this Act and being either—(*a*) a mortgage or charge for the purpose of securing any issue of debentures.

Further, cl. 15 provides for the reissue of debentures. It would be impossible to apply the provisions of this clause to an ordinary mortgage E of freehold property. If a first mortgage is paid off, the payment off enures for the benefit of the second mortgagee, if there is one, and it would be impossible to reissue the first mortgage. Indeed, the word "re-issue" is meaningless in the case of a mortgage which has been paid off.

F In the Companies Act, 1908, which is a consolidating Act, the provisions of sect. 14 of the 1907 Act are to be found in sect. 103. The words "for the purpose of removing doubts" are omitted. Sect. 103 is one of a number of sections appearing under the general heading "Debentures and Floating Charges," while the provisions with regard to G registration of mortgages and charges appear in a number of sections under the general heading "Information as to Mortgages, Charges, etc." Sect. 285 defines "debenture" as including debenture stock. The words "mortgages," "charges," "debentures" are all used in the Act, but there is nothing further in the 1908 Act to suggest that these H terms were used in that Act as being convertible terms. The Companies Act, 1929, was, like the 1908 Act, also a consolidating Act. Sect. 103 of the 1908 Act reappears as sect. 74 in the 1929 Act. This is the section under consideration. In the 1929 Act, it appears with a number of other sections under the general heading "Special provisions as to debentures." In none of these sections does the word "mortgage" appear. Mortgages and charges are dealt with specifically in Part III of the Act, under the title "Registration of Charges," and there is an express provision in sect. 79 (10) (the section with which Part III of the Act starts) that in this part of the Act the expression "charge" includes "mortgage." A careful perusal of this part of the Act makes it plain that the words "mortgage," "charge" and "debenture" still continue to be used as A separate and distinct descriptive terms.

So far, I feel no doubt that an ordinary mortgage of freehold property would not be included in the description "debenture." The defendant's argument that it is so included is based solely on the new definition of debenture to be found in sect. 380 of the 1929 Act. It must be remembered B that this definition applies only unless the context otherwise requires, and that there is a separate definition of "charge" as including mortgage in Part III of the Act. It seems to me that sect. 74 and the other sections classified with it under the heading "special provisions as to debentures" are confined to debentures, to the exclusion of mortgages, which are dealt C with in Part III under the general heading "Charges," which, by the *ad hoc* definition clause, includes mortgages in the ordinary sense of the words.

To hold otherwise would, I think, result in the conclusion that, although the Companies Act, 1929, is a consolidating statute, and must ordinarily D be construed so as to exclude any amendment of the existing law, it has in fact effected an amendment by the extension of the definition of "debenture" in sect. 380. In the result, I hold that the Companies Act, 1929, s. 74, does not apply to the mortgage deed of Nov. 6, 1931, and consequently has no application to prevent the operation of the E equitable doctrine relating to unreasonable postponement of the period for redemption. I have already expressed the opinion that, in the present case, the period of postponement for redemption for 40 years, having regard to the provisions of the mortgage deed, offends against that doctrine, and I therefore hold that the plaintiff company is entitled to the F declaration sought.

Solicitors: *Clifford-Turner & Co.* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *Bremner, Sons & Corlett*, Liverpool (for the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

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NOTE.

TELSEN ELECTRIC CO., LTD. *v.* J. J. EASTICK & SONS (NO. 2). H

[Court of Appeal (Greer, Slesser and Clauson, L.JJ.), **March 28, 1938.**]

An appeal from the decision of Lawrence, J., reported in [1938] 1 All E.R. 436 was dismissed by consent.

R. *v.* BOARD OF CONTROL, *Ex parte* WINTERFLOOD.

[COURT OF APPEAL (Slesser and Clauson, L.JJ., and Goddard, J.), **April 8, 1938.]**

Lunacy—Defective—Detention—Order—Continuance order—Whether imperative that it should be made on date of expiry of previous order—Mental Deficiency Act, 1913 (*c.* 28), *ss.* 10, 11.

On June 11, 1929, an order was made under the Mental Deficiency Act, 1913, that the applicant, being then a defective, should be detained in an institution. That order would have expired on June 24, 1930, but it was continued by a continuance order made on June 23, 1930. These orders were admittedly valid. A further continuance order, which would have continued the detention for a further 5 years, was dated June 29, 1931, but was not finally accepted by the commissioner until July 7, 1931. A further continuance order was made on July 6, 1936. It was contended that the last two orders were invalid, having been made after the date of expiry of the previous order :—

HELD : (i) the order dated June 29, 1931, was invalid, as it was made after the previous order had expired.

(ii) a continuance order cannot be antedated or made retrospective. The order of June 29, 1931, was invalid for this further reason.

(iii) the order made on July 6, 1936, was also invalid, as it purported to continue an order which was itself invalid.

(iv) [per SLESSER, L.J.] the words of the Mental Deficiency Act, 1913, s. 11, are unambiguous, and therefore argument *ab inconvenienti* is not admissible to construe that section.

Decision of the Divisional Court ([1937] 4 All E.R. 163), *reversed.*

[EDITORIAL NOTE. The Mental Deficiency Act, 1913, s. 11, provides for the making of detention orders. An order remains in force in the first place for one year, but, if continued at the expiration of the year, the order then remains in force for a further 5 years. The question in the present case is whether the order continuing a detention order must necessarily be made at or before the expiration of the previous order, or whether it can be made within a reasonable time thereafter. The divisional court held that, having regard to the great number of such orders and the care required to decide upon their continuance, the legislature can only have meant that the officials concerned should have a reasonable time in which to make the order. This view has been rejected by the Court of Appeal, for the reason that the wording of the section is unambiguous, and it is therefore necessary that its requirements shall be precisely complied with.

AS TO DETENTION ORDERS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 472-474, para. 847 ; and FOR CASES, see DIGEST, Vol. 33, pp. 272, 273, Nos. 1897-1903.]

APPEAL by Winterflood from a decision of the divisional court (LORD HEWART, L.C.J., HUMPHREYS and DU PARCQ, JJ.), dated Oct. 27, 1937, and reported in [1937] 4 All E.R. 163. The facts are fully set out in the judgments.

W. A. L. Raeburn for the appellant.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondents.

Raeburn : An order made under the Mental Deficiency Act, 1913, or a continuation of such order, expires automatically if it is not continued under the terms of sect. 11. The order dated June 6, 1931, was made before the statutory conditions precedent had been fulfilled.

The Attorney-General : The construction of sect. 11 by the divisional court is right. The words of the section must be considered in relation to the context in which they appear, and in relation to the intentions of Parliament. There is an obvious ambiguity in the words. The same words are used to cover two separate activities : (i) considering the reports, and (ii) sealing the document. The second time the word " consider " is used in this section, it refers to the consideration by the board. The language here is ambiguous, and therefore the court can pay attention to the question of convenience. The words " at the end of the period " are very loose. If they are strictly read, the board would be committing a breach of duty if they considered a case before the end of the period. It is a frequent incident in the administration of justice that formal orders are made retrospective. The board are entitled to a reasonable period before and after the expiry of the time in question.

Raeburn was not called on to reply.

Slesser, L.J. : On July 27, 1937, a rule *nisi* was granted by the divisional court calling upon certain persons, with whom we are not now concerned—namely, Rhoda Mordey and the mayor, aldermen and burgesses of the county borough of East Ham, and also the Board of Control Lunacy and Mental Deficiency for England and Wales—to show cause why a writ of *habeas corpus* should not issue directed to them to have the body of Horace Edward Winterflood immediately before this court to receive such things as this court should then and there consider of concerning him in this behalf. That rule *nisi* came before the divisional court for consideration on the application to be made absolute on Oct. 27, 1937, when the divisional court discharged the rule. We are not now concerned with the matter so far as it concerns the East Ham Corporation or the lady. This appeal is brought solely against the Board of Control by Winterflood, saying that, in all the circumstances of the case, the divisional court was wrong in its determination.

The facts of the case may shortly be stated thus. On June 11, 1929, under the provisions of the Mental Deficiency Act, 1913, an order was made by a competent court that Winterflood, then being a defective, should be sent to an appropriate institution referred to in the Act. That order was made in accordance, as I have stated, with the Mental Deficiency Act, which requires in the first instance that the order be made by the competent authority. In 1930, having been sent to a farm at Hildenborough appropriate for his detention, he was released on licence to live with his parents, which he did for a certain time, and on June 23, 1930, a continuation of the detention order was made. Up to that time, no question arises but that all the orders in this case were perfectly properly made, and continuation of the detention had duly been authorised in June, 1930, to expire, as I read the statute, on June 23, 1931. The Mental Deficiency Act, 1913, s. 11(1), provides :

> An order made under this Act that a defective be sent to an institution or placed

> under guardianship shall expire at the end of one year from its date, unless continued in manner hereinafter provided : Provided that in the case of any institution the board may by order direct that orders that persons be sent thereto shall, unless continued as hereinafter provided, expire on the quarter day next after the day on which the orders would have expired under the above provision.

In this case, the impeached continuance order is dated June 29, 1931,
A and it is contended that, in so far as the order which the Board of Control had made in 1930 was dated June 23, 1930, that order had expired and ceased to have any effect, and therefore could not be continued at the time when the order of June 29, 1931, for five years, was made under sect. 11 (2), and that, therefore, on and after June 24, 1931, the Board
B of Control were unable in law to show any cause for detaining this man in their custody. It is upon that failure to make the order within a year of June 23, 1930, that this application for *habeas corpus* is brought. After 1931, this man continued to be detained under the 1931 order for the statutory period, in accordance with the provisions of sect. 11(2),
C which provides :

> An order shall remain in force . . . thereafter for successive periods of five years, if at that date and at the end of each period of one and five years respectively the board, after considering such special reports and certificate as is hereinafter mentioned and the report of any duly qualified medical practitioner who, at the request of the defective or his parent or guardian or any relative or friend, has made a
> D medical examination of the defective and the means of care and supervision which would be available if the defective were discharged consider that the continuance of the order is required in his interests and make an order for the purpose.

It is not disputed here by the Attorney-General that, if in fact the order which had been made on June 23, 1930, had expired before June 29, 1931,
E and if, consequently, there was, in that interval between June 24, 1931, and June 29, 1931, an improper detention, the extension of five years after June 29, 1931, must also be indefensible, because it would not be made under an extant order. Therefore, the question primarily here to be considered is whether on June 29, 1931, it could be said that the order
F thus made and sealed by the Board of Control had such an effect that it did legalise the detention after June 23 or June 24, 1931.

In my opinion, having regard to the provisions of the statute, it is not possible to say that the order made on June 29, 1931, was competent at that time to operate upon this man, whose period for detention had
G expired on June 24, 1931. The reason why I come to that conclusion is this. The Mental Deficiency Act, 1913, s. 11, seems to me to be unambiguous in its terms. I do not think that the language is such as to permit any consideration of the conveniences or inconveniences which may be felt in operating the Act by the Board of Control. It is only
H where the language is ambiguous that it is admissible to consider what may be the consequence of giving to it a meaning which is inconvenient. The argument *ab inconvenienti* is admissible in construction only where the meaning of the statute is obscure. Where the language is explicit, its consequences are not for the courts to construe. In such a case, the suffering citizen must appeal for relief to the lawgiver, and not to the

lawyer. The judges in the divisional court in this case have referred to the language of this sect. 11 as vague, but I can find, speaking for myself, no vagueness in its provisions. Under sect. 10 (1), it is provided that a defective may be sent to an institution, and, after providing other matters, it goes on :

> His detention in that institution for such period as is hereinafter mentioned [is legalised]. A

The " period hereinafter mentioned " is contained in sect. 11. The first provision of subsect. (1), which I have already read, is to the effect that the order made by the judicial authority under the Act that a defective be sent to an institution B

> shall expire at the end of one year from its date unless continued in manner hereinafter provided.

The only extension to that year is contained in the proviso, to the effect that, where it is a case of the inmate of an institution,

> the board may by order direct that orders that persons be sent thereto shall . . . expire on the quarter day next after the day on which the orders would have expired under the above provision. C

Thus, the necessary termination of the effect of the order must take place at the latest on the expiration of the quarter day next after the day on which the orders would have expired apart from the above D provision. Applying that provision to this case, the Board of Control directed that the judicial order, unless continued, should expire on June 24, 1930. Then, acting under the provisions of subsect. (2), a continuing order was made by the board on June 23, under the words of the empowering subsection, to the effect that : E

> An order shall remain in force for a year after the date when under the preceding provisions of this section it would have expired, and thereafter for successive periods of five years.

The right time, then, when a further order for the successive period of five years ought to have been made was on June 23 or June 24, 1931, F when the order made on June 23, 1930, expired. There can be no question, I think, as HUMPHREYS, J., indicates in his judgment in the divisional court, that the date at which the order is made must be taken to be the date when that order is sealed in the presence of the competent witness. Statutory forms have been devised under this Act, and the G form in question, Form D.3, recites that the board, having considered the requisite reports and so on, are satisfied that the continuance of the order is required in the interests of the detained person, and " hereby order the same to be continued for one or five years." There follows :

> The common seal of the Board of Control was hereunto affixed this day in the presence of . . . H

As the Act provides that the Board of Control shall be a corporation and have a seal, I cannot see any other way in which the order could be promulgated except by the method of an order under their seal, nor is it seriously suggested that it could be done in any other way.

It follows, therefore, that we have here a case where for five or six days it would have been possible for this detained person lawfully to walk out of the institution in which he was detained, and nobody could point to any authority under which they could properly detain him. In considering, now that he has been further detained, whether he has not the A same right to demand his rule, I think the same considerations must apply. The Attorney-General has argued that this view is not a correct one, because he says that the Act contemplates in sect. 11 (2) that the board will give consideration to certain matters, and that, if they come to their final consideration, after taking those matters into account, that the B continuance of the order is required, it assumes that thereafter they may make an order within a reasonable time from their final consideration, which, as I understand it, he concedes must be made within the period of one year. I do not so read the section. The drafting is unfortunate, in the sense that the word "consider" is used twice in the C section. The board first of all are to consider various special reports, certificates, and the like. That can clearly be done during the period of either one or five years, because the provision is that, after considering such reports, certain acts are to be done. It goes on to say that, after considering those reports, the board are to make the order if they con- D sider that the continuance of the order is required in the interests of the detained person. I think that that word "consider" there means "are satisfied," and that is exactly the view which is taken in the form itself—not that it is legitimate to construe the meaning of an Act by reason of a form made under the Act, but I mention it because it so E exactly agrees with my view of the construction of the Act. The phrase in the form is:

> The Board of Control, having considered the requisite matters and being satisfied that the continuance of the above-mentioned order is required, make the order.

In my view, that is no more than saying in the section that it is a con- F dition necessary to make a valid order that they should be, at the time of so making, satisfied, after considering the various matters set out in the section, that an order ought to be made. That is, they must satisfy themselves and declare that the continuance of the order is required in the interests of the detained person. All those considerations, as I say, G may take place before the order is made, but the making of the order, and the satisfaction, on the consideration of all the matters, that the continuance of the order is necessary, appear to me to be one and the same act, the satisfaction as to the matters which they have to consider being a condition under which, and under which alone, the order can H be made.

Therefore, in this case, for the reasons which I have stated, I think that it is impossible to say that this man was validly detained, because no order was made in 1931 within the period required by sect. 11 (2) of the Act. Having said that, I must point out that there is a second and further reason for acceding to Mr. Raeburn's argument in this case.

In my view, on the evidence which was before the divisional court and is before us, on the affidavits disclosed, on any view it is not possible to say that this was a valid order. It is, as I have said, a necessary condition of making the order that the competent authority, which may be one commissioner, as the Act prescribes, considers that the continuance of the order is required in the interests of the detained person. The facts of the A
case go to show that, so far from that requirement being satisfied, this order being dated June 29, 1931, it was not until July 7, 1931, that the commissioner who had to satisfy himself of the requirements of the section came to his final conclusion. I do not think it necessary now to go into the details of this matter, but the fact is, as appears from the affidavits, B
that, a report and certificate having been received from the visitors on June 11, 1931, by the Board of Control, and a special report and certificate having been received on May 30, 1931, they did not satisfy the Hon. H. C. Bailey, who was then one of the board's commissioners dealing with orders, and he sent them back again, with this instruction : C

> First return special report for class and facts in support ; also for reinstatement of words " in an institution."

The order had come to him with the statement that this man was not in an institution, which was in fact inaccurate, but stating that he was under guardianship. The matter was therefore sent back for reconsidera- D
tion, and was so reconsidered, apparently, on July 4, when fuller details were sent to the commissioner under the signature of Mr. Malcolm Barker, the deputy medical officer, giving information about the mental deficiency of this person, saying that he exhibited irritability but was amenable to discipline, and that he had certain other deficiencies, some E
of which may be shared by others, such as the inability to do simple sums, and others of a more serious nature. In any event, that matter went back again to the commissioner, who was then Surgeon-Rear-Admiral Hall, and it was not until July 7 that he directed its acceptance. It follows, therefore, that the statement which appears in the order F
impeached of June 29, 1931, to the effect that the Board of Control, having considered the requisite reports and certificates and the means of care and supervision, were satisfied that the continuance of the above-mentioned order was required, was not the fact. They were not so satisfied through their competent commissioner until July 7, and for G
that reason also, as I say, the order is defective, because it is a condition of making the order, as I read again from the last words of subsect. (2), that the commissioners or the competent commissioner consider that the continuance is required in his interests, and, if that word " consider " there, as I think, must mean, on the consideration preceding it, satisfied, H
it is *falsa demonstratio.* In fact, no such satisfaction was arrived at until July 7.

For both these reasons, therefore, both because the order on the face of it is bad, and, secondly, because the order was made too late to comply with sect. 11, I am of opinion that there was no right to detain this man in this institution for more than a year after the date when the preceding order had been made in 1930, and, consequently, that the divisional court were wrong in ordering the discharge of the rule, and that this appeal ought to be allowed.

A CLAUSON, L.J.: I agree that this appeal ought to be allowed, and I desire to base my decision upon one point, which I can state quite shortly. On June 23, 1931, or possibly on June 24, 1931, an order expired under which the present applicant was being lawfully detained under the Mental Deficiency Act, 1913. That order expired, unless it had been B continued in accordance with the provisions of sect. 11 (2) of the Act of 1913. As evidence of the fact that it was continued, there is produced an order of the Board of Control which purports to be an order sealed on June 29, 1931. I will assume for the moment that the mere fact that that order was dated after the expiration of the order under which the C defective was being detained up to June 24, 1931, does not matter, though I wish most carefully to guard myself from its being supposed that I take the view that it does not matter. On investigating the facts, however, it appears that that order of June 29, 1931, is a nullity, for the reason that the Board of Control can exercise its powers through a D commissioner. The matter came before the commissioner, Mr. Bailey, at a date just anterior to the expiry of the admittedly valid order. He was not prepared to make, on behalf of the Board of Control, a continuation order. He required certain amendments to be made in the certificates placed before him. Nevertheless, on June 29, if credence is E to be given to this document, this order was sealed by the board. It appears from the affidavits that what in fact happened was that another commissioner, in the absence of Mr. Bailey, investigated the matter, and made up his mind at some date between July 4 and July 7, 1931, that it was proper to make a continuation order. Having made up his mind, F what purported to be an order of June 29 was (if I may use the common expression), released, and is now brought before us as a valid order. It appears to me that it was necessarily an invalid order. In fact, on June 29, neither the Board of Control nor anybody acting under the Board of Control did in fact consider either that the continuance of the G order was required in the interests of the patient or that an order ought to be made. Accordingly, in my view, that document is an entire nullity. It has no effect at all.

It was admitted that, if that document was ineffective, the purported continuance of the order by an order of July 6, 1936, would be equally H ineffective. It is impossible, of course, to continue an order which has expired, and which has been continued up to the date of the suggested fresh continuance, if at all, by a document which is a nullity. Accordingly, at the date of this application, there was no valid order in existence under which this defective could be detained. For these reasons, it appears to me that the decision of the divisional court cannot be supported.

Goddard, J.: I agree with Slesser and Clauson, L.JJ., in differing from the divisional court, and I will briefly state my reasons. The angle from which the divisional court approached this case seems to me to be this. They said that, as the statute by sect. 11 (2) provides, at the end of each period for which the order is effective, that the board are to consider, and, after considering certain reports and certificates, which are mentioned in the statute, may make an order, if they see fit, continuing the original order, that they must have an opportunity of considering the matter after the expiration of the period for which the original order was valid. The difficulty which I see in the way of accepting that view, and the great difficulty which I feel in the case, is this. In common law, if one person deprives another of his liberty, or detains him, and if a writ of *habeas corpus* is sought against him, or an action for false imprisonment is brought, the person who has detained the other can only avoid the writ or set up a defence to the action for false imprisoment if he can show a legal authority for detaining the person who has been detained. The legal authority need not always be an authority in writing. A police constable who arrests a person suspected of a felony can arrest and detain that person until he can bring him before a magistrate, who will then either remand the prisoner to prison until the case is inquired into, or hold him on bail. When a judge has sentenced a prisoner, and the gaol delivery is not signed until some weeks afterwards, the sentence stands from the day on which it is delivered, and the gaoler who is in court has authority, by the judge pronouncing sentence, to hold the prisoner for the period for which he is sentenced. In this case, however, the applicant being under the control or detention of the Board of Control, the Board of Control say that they are detaining him, or allege that they are detaining him, by virtue of the Mental Deficiency Act, 1913. They must, therefore, in my judgment, show that they have, at the time when he complains that he was wrongfully detained, a valid and effective order in force. The Act contains provisions as to how orders are to be obtained. The formalities of the Act have to be followed. An order can be obtained either by presentation to a judicial authority in the manner provided in the Act, on which the judicial authority as defined in the Act can make an order, or, as quite frequently happens, a court exercising criminal jurisdiction, if satisfied that the prisoner who is found guilty, or pleads guilty, is a mental defective within the meaning of the Act, can make the same order as a judicial authority under the Act may make. That is the only way in which the Mental Deficiency Act, as far as I know, can be set to work. Sect. 10 of the Act then provides:

> (1) An order that a defective be sent to an institution shall authorise the conveyance of that person to and his reception . . . and his detention in that institution for such period as is hereinafter mentioned. . . .

The period which is thereinafter mentioned is one year. It is provided in sect. 11 of the Act:

> (1) An order made under this Act that a defective be sent to an institution or placed

under guardianship shall expire at the end of one year from its date, unless continued in manner hereinafter provided.

If, therefore, the Act provides in plain terms that the order shall expire at one year from the date, when one year from the date has elapsed, the order is no longer of effect, and the keeper of the institution, or wherever the defective may be, has no warrant in law for detaining him there. If, then, the Board of Control consider that the defective should be confined in the institution for a longer period, they must, in manner provided in the Act, make an order providing for the continuance of the detention, a continuation order. That order, it seems to me, must come into effect, and they must make it come into effect at the time when the previous order has expired. I can see myself that there may be great administrative difficulties in the way. It may very well be that it would be in the interests of these unfortunate people that some provision should be made for a period after the expiration of the order during which they should be held in what one may call temporary custody while the Board of Control are considering the case. The answer is that the Act does not provide for it, and, if that, as a matter of administration, is considered desirable, it is in Parliament, as SLESSER, L.J., has said, that the power must be sought. The courts have always been jealous, and have always taken a strong view, with regard to these matters where people are held in confinement against their will, and, unless legal authority is shown, the court has always ordered the discharge of the person so held. It seems to me impossible to say that, at midnight on June 23/24, 1931, there was any legal authority in the keeper of the institution to hold the defective. Even assuming that the order was made on June 29—and, for the reasons expressed by SLESSER, L.J., and the grounds which he stated, which I entirely share, I do not think it was—I can find no legal justification for having held the defective from June 24 to June 29. In these circumstances, I agree that the writ of *habeas corpus* should issue, and that this appeal should be allowed.

Appeal allowed and rule made absolute.

Solicitors: *E. A. R. Llewellyn & Co.* (for the appellant); *The Solicitor, Ministry of Health* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

SUPER SITES, LTD. *v.* KEEN.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 12, 1938.**]

Public Health—Buildings—Advertisement hoarding near highway—Surrey County Council Act, 1931 (*c. ci*), *s.* 67.

The appellants erected on their land at the side of a main road in the County of Surrey an advertisement hoarding without the consent of the county council. The Surrey County Council Act, 1931, s. 67, enacted that any person constructing, forming or laying out any street or means of access, or erecting any building in contravention of the provisions of that section, should be liable to a penalty :—

Held : the advertisement hoarding was a building within the meaning of the section.

[**EDITORIAL NOTE.** Local authorities and persons interested in estate development will find this decision of assistance. Local authorities for many reasons find it necessary to restrict the erection of hoardings near the highway. Further restrictive covenants often restrict the erection of buildings without any definition of what may be a building within the meaning of the covenant. It is not an unusual happening that in course of time an advertisement hoarding is erected, or proposed to be erected, and that such erection is opposed by the owners of the estate, and neighbouring owners or tenants of property deriving title from them. The present case is, of course, a decision purely upon the construction of a local Act, but, no doubt, it will be of considerable value, as there are so few authorities upon the point.

As to Advertisement Hoardings as Buildings, see HALSBURY, Hailsham Edn., Vol. 26, pp. 335, 336, para. 676 ; and for Cases, see DIGEST, Vol. 38, pp. 183, 184; Nos. 229-241; and Vol. 40, p. 315, No. 2683, and p. 318, No. 2701.]

Case referred to :

(1) *Paddington Corpn.* v. *A.-G.*, [1906] A.C.1 ; 7 Digest 553, *300* ; 75 L.J.Ch. 4 ; 93 L.T. 673 ; *revsg.* S.C. *sub nom. Boyce* v. *Paddington Borough Council*, [1903] 2 Ch. 556 ; *restoring* S.C. *sub nom. Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109.

Appeal by way of case stated. At a court of summary jurisdiction sitting at Kingston-on-Thames information was laid by one Edward Neville Keen, hereinafter called the respondent, for that the appellants between Dec. 1 and Dec. 14, 1936, in the county of Surrey did unlawfully erect on the west side of the Hampton Court-Esher Road on a plot 200 yards or thereabouts south of the bridge over the River Ember a building, namely, an advertisement hoarding without previously having obtained the consent of the Surrey County Council, contrary to the provision of the Surrey County Council Act, 1931, s. 67. The appellants were convicted and fined 1*s*.

The Surrey County Council Act, 1931, s. 67, provides as follows :

(1) The council may by resolution determine (*a*) within one year after the commencement of this Act that any of the roads referred to in subsect. (2) of this section or any part of any of those roads or if any or any part of any of those roads shall not have been constructed before the passing of this Act the lands upon which such road or part of a road is intended to be constructed ; or (*b*) at any time and from time to time after the passing of this Act that the land on which shall be situate any road or any part of a road intended to be constructed by the council shall be a main thoroughfare for the purposes of this section.

(2) The roads referred to in subsect. (1) (*a*) of this section are . . . (xiii) the new road between Hampton Court Bridge and Esher now under construction by the council by virtue of the Middlesex and Surrey (Thames Bridges, etc.) Act, 1928.

(4) (*a*) After the date of the first publication of any such resolution it shall not be lawful without the consent of the council (which consent shall not be unreasonably withheld) to construct form or lay out any street communicating with or any means of access (whether private or public) for vehicles or foot passengers to or from any main thoroughfare the subject of such resolution or to erect any building within 200 ft. from any part of any such main thoroughfare except for the purpose of finishing the construction or erection of any street means of access or building begun or of carrying out any contract entered into before that date. Any consent of the council under this subsection may be given subject to such conditions as the council think fit to impose and any conditions so imposed shall be binding upon any successor in title to the owner lessee or occupier of any land to which they relate.

(8) If any person constructs forms or lays out any street or means of access or erects any building in contravention of the provisions of this section he shall (with-

> out prejudice to any other proceedings which may be available against him) be liable on conviction by a court of summary jurisdiction to a penalty not exceeding £50 and to a daily penalty not exceeding £5 and in addition and whether he shall have been convicted of any such offence or not the council may close up or remove any such street or means of access or demolish any such building.

The hoarding in question was of a height of 18 ft. 10 ins. from ground level to its top. It was supported by timber struts, bolted to concrete posts in the ground, and had two sides only, and no top. It did not reach the ground, the struts supporting it being visible from the road. The hoarding was an advertisement to which the Advertisement Regulations Acts, 1907 to 1925, apply. The appellants contended that the hoarding was not a building within the meaning of the Surrey County Council Act, 1931, s. 67, and further contended that a distinction was to be drawn between the words of sect. 67 and those of sect. 66 (2) of the Act, the latter section being as follows :

> After a building line has been prescribed as aforesaid it shall not be lawful except with the written consent of the council to erect any new building or to bring forward any building construction or erection or any part thereof or any addition thereto other than boundary walls or fences or to make any permanent excavation in front of the building line. Any consent of the council under this subsection may be given subject to such conditions as the council think fit to impose and any condition so imposed shall be binding upon any successor in title to the estate owner or occupier of any land to which they relate.

The appellants further contended that, upon the true construction of these sections, the word " building " in sect. 67 meant a structure wholly enclosing a space and being covered, and the inside of which is capable of being occupied and used for some purpose, and also referred to the definition of " building " in the Restriction of Ribbon Development Act, 1935, which definition is as follows :

> " Building " includes neither fences, gates, posts, masts, ornaments, or other similar structures or erections required for the purposes of agriculture or of any dwelling-house or garden occupied with a dwelling-house, nor greenhouses or summer-houses required in connection with any such garden, nor temporary tents or scaffolding required for any purpose, but save as aforesaid includes any structure or erection of whatsoever material and in whatsoever manner constructed, and any part of a building.

The respondent contended (i) that the question as to whether or not any particular structure was a building was one of fact to be determined by the court ; (ii) that in making their decision the justices were entitled to take into consideration the mischief against which the section in which the word was used was directed ; (iii) that the Surrey County Council Act, 1931, s. 67, was concerned, *inter alia*, with the preservation of the amenities of the county in proximity to main roads, and as such the word " building " used therein was of wide application, and included the said hoarding ; and (iv) that the interpretation of the Surrey County Council Act, 1931, was not affected by the terms of the Restriction of Ribbon Development Act, 1935.

Arthur Capewell, for the appellants : As there is no definition of the word " building " in the Act, it falls to be construed in accordance with the ordinary usage of the language. One does not ordinarily use the word "building" to describe the structure in this case. This is a penal section—carrying with it the possibility of a penalty of £50 and a daily penalty of £5—and the canons of construction applicable to such sections must be applied here. The section must be construed, so far as possible, in favour of the subject. Looked at in this way, the word "building," in its ordinary signification, is wholly inapplicable to a structure such as this two-sided advertisement hoarding The word "building" is defined in *Boyce* v. *Paddington Borough Council* (1) and *Paddington Corpn.* v. *A.-G.* (1).

Edward J. Rimmer, for the respondent, was not called on.

Lord Hewart, L.C.J.: In our opinion, this appeal fails. The justices have come to the conclusion that, for the purposes of the Act which they were considering, this hoarding, of which we have not only the dimensions but also a photograph, was a building within the meaning of the Act, and that it was a building erected without the consent of the local authority. Counsel for the appellants has suggested nearly everything which ingenuity could discover against the conclusion of the justices, but, in our opinion, all the contentions made on behalf of the respondent were correct—namely, first, that the question of whether or not the particular structure was a building was one of fact to be determined by the justices; secondly, that in making their decision the justices were entitled to take into consideration the mischief against which the section in which the word was used was directed; and, thirdly, that the Surrey County Council Act, 1931, s. 67, was concerned, *inter alia*, with the preservation of the amenities of the county in proximity to main roads, and, as such, the word "building" used therein was of wide application and included the said hoardings. I should be very slow to be driven to the conclusion that these justices were wrong, and the judgments in the House of Lords to which our attention has been directed support the findings of the justices in this case.

Branson, J.: I agree.

Humphreys, J.: I agree.

Appeal dismissed.

Solicitors: *Tackley, Fall & Read* (for the appellants); *Dudley Aukland* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

GREENWOOD *v.* ATHERTON.

[MANCHESTER WINTER ASSIZES (Lewis, J.), **March 18, 21, 1938.]**

Public Authorities—Limitation of actions—What bodies protected—School managers and headmistress—Injury to child through want of supervision—Public Authorities Protection Act, 1893 (*c.* 61)—*Education Act,* 1921 (*c.* 51) *ss.* 29-31.

The plaintiff, an infant, was injured at school during an authorised recreation period by the swinging to of a pair of iron gates, which crushed his hand. The accident happened on Apr. 8, 1937, and on Nov. 10, 1937, more than 6 months later, a writ was issued against the defendants, who were respectively head teacher and managers of the school, claiming damages for breach of duty. The defendants pleaded the Public Authorities Protection Act, 1893. The school was a non-provided voluntary school, which under the Education Act, 1921, received a grant towards the cost of education. The school and its body of managers were in existence before the passing of the Education Act, 1921. For the purposes of carrying out the provisions of the Act, supervision and instruction, including recreation, were among the duties which the managers with the assistance of the head teacher had to perform. The plaintiff contended that the duty of supervision was not a public duty, but was owed to a particular class of children :—

HELD : (i) the managers were a statutory body acting in the execution of the Education Acts.

(ii) the duty of supervision was a duty owed to all the children who attended the school, and was a public duty protected by the Public Authorities Protection Act, 1893.

(iii) the head teacher was acting as the servant of the managers.

(iv) the action was therefore barred as being out of time.

[**EDITORIAL NOTE.** The parties seeking the protection of the Public Authorities Protection Act were here attacked on two grounds. It was said first that they were not a public authority. Although the Act refers to " any person " and any act done in pursuance or execution or intended execution of any Act of Parliament or any public duty, it is well established that it does not in fact apply to any person, but only to public authorities. Before this decision, it had not in terms been decided that the managers of a non-provided school were within the Act. It was also argued that the duty here in question was not owed to the public in general, but to the particular class of children attending the school. This contention was rejected.

AS TO PUBLIC AUTHORITIES PROTECTION ACT, 1893, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-297, paras. 609-616 ; and FOR CASES, see DIGEST, Vol. 38, pp. 101-112, Nos. 725-795.]

Cases referred to :

(1) *Bradford Corpn.* v. *Myers,* [1916] 1 A.C. 242 ; 38 Digest 110, *784* ; 85 L.J.K.B. 146 ; 114 L.T. 83 ; *affg.* S.C., [1915] 1 K.B. 417.

(2) *Parker* v. *London County Council,* [1904] 2 K.B. 501 ; 38 Digest 103, *739* ; 73 L.J.K.B. 561 ; 90 L.T. 415.

(3) *Greenwell* v. *Howell,* [1900] 1 Q.B. 535 ; 38 Digest 105, *751* ; 69 L.J.Q.B. 461 ; 82 L.T. 183.

ACTION for damages for personal injuries. By agreement of counsel, a preliminary point as to the application of the Public Authorities Protection Act in the circumstances following was argued before the trial of the action. On Apr. 8, 1937, the plaintiff, a schoolchild, was injured during the authorised recreation time by the swinging to of a pair of iron gates in the school yard. The writ in the action was not issued until Nov. 10, 1937, more than six months after the date of the accident. The defendant managers contended that they were a public authority for the purposes of the Act, and Miss Atherton contended that at all material times she was the servant of the managers in such capacity, that her duties were public duties, and that she had no private duties to perform at the school.

Joseph Lewis for the plaintiff.

J. C. Jolly for the first defendant.

Ralph Etherton for the second defendants.

Lewis : The onus of proving that they are a public body is on the defendants. The managers could, upon giving eighteen months' notice, close the school and surrender their powers. Their duty is only to such children as they choose to admit. It is a duty taken on voluntarily, and they cannot invoke the protection of the Act. They were in existence before the Education Act, and need not have gone into the scheme under the Act. The doing of this does not make them a public body. They are still a private body of managers, who, whilst they have agreed to a certain standard of efficiency, are still dispensing voluntary charity as before. They still owe a duty only to children accepted as pupils—i.e., to a particular class, and not to the public at large. There is a common law duty on the managers to exercise the care of a careful parent.

Etherton : Even if the managers' duty is a statutory one, to a limited class only, they are carrying out their supervision pursuant to the Education Acts, and the plaintiff was under their general supervision at the time in question. The managers of a non-provided school must accept all children in the area, provided there is accommodation for them.

LEWIS, J. : This is an action brought by an infant plaintiff, aged 5 years, suing by his father, James Greenwood. He claims against several defendants damages for breach of duty. The first defendant is Agnes I. Atherton, the head teacher at the school at Littleborough, and the other defendants are the managers of that school. Paras. 3 and 4 of the statement of claim are as follow :

> 3. On or about Apr. 8, 1937, at about 10.45 a.m. during the ordinary school hours, the infant plaintiff was playing with other children in the playground adjoining the said school when he sustained an injury by reason of a pair of large iron gates swinging together and crushing his left hand.
>
> 4. The said injury was caused by the negligence of the defendants in failing to take due care of the infant plaintiff whilst in attendance at the said school.

The particulars of negligence are as follow :

> The defendants were negligent in that they : (*a*) sent the children, and in particular the infant plaintiff, to play in the said playground without first seeing that it was safe for the children so to do, and that the said iron gates were closed and/or locked ; (*b*) failed to send a teacher or any other responsible person into the said playground to supervise the said children, or to prevent the said children from playing or swinging on the said iron gates ; (*c*) allowed the children to play in a playground where they were likely to suffer injury by reason of there being iron gates open or unlocked ; (*d*) failed to take reasonable care to secure the safety

> of the infant plaintiff whilst playing in the said playground when they knew or ought to have known that the said gates were open and/or unlocked.

Then it sets out the injuries the child suffered, and the claim made for damages.

The cause of action arose on Apr. 8, 1937. The writ was not issued until Nov. 10, 1937, more than 6 months after the cause of action arose, and the defendants—namely, the head mistress and the managers—have pleaded the Public Authorities Protection Act, 1893. Sect. 1 of that Act reads as follows :

> Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect : (*a*) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 6 months next after the act, neglect, or default complained of. . . .

Counsel agreed that the point with regard to the Public Authorities Protection Act should be argued as a preliminary point, and that argument has already taken place before me. The school is a non-provided voluntary school, which, under the 1921 Education Act, gets a grant in respect of the cost of the education, and so on. I was referred to the most important sections of the Act. Sect. 29 deals with the conditions to be observed in the conduct of non-provided schools, and provides as follows :

> (1) The local education authority shall be responsible for, and have the control of, all secular instruction in public elementary schools not provided by them.
>
> (2) A local education authority shall maintain and keep efficient under this Act a public elementary school not provided by them only so long as the school is necessary and the following conditions and provisions are complied with :
>
> (*a*) the managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction . . .
>
> (*d*) the managers of the school shall provide the schoolhouse free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the schoolhouse in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority: provided that such damage as the local education authority consider to be due to fair wear and tear in the use of any room in the schoolhouse for the purpose of a public elementary school shall be made good by the local education authority.

Subsect. (6) provides as follows :

> The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act and shall, subject to the powers of the local education authority under this section, have the exclusive power of appointing and dismissing teachers.

Then sect. 30 (2) provides as follows :

> All public elementary schools not provided by the local education authority shall have a body of managers consisting of a number of foundation managers not exceeding four appointed as provided by this Act. . . .

Then power is given under the Act for the making of regulations for a school such as this by the Board of Education, and amongst those regulations is a regulation that every school must have a head teacher responsible for the general control and discipline. The recreation period is dealt with, and the proper recreation period is reckoned as part of the secular instruction. It was stated in this case, for the purpose of argument, that the child who was injured as alleged in the pleadings during ordinary school hours was injured during one of the regular recreation periods. The defendants say that they are covered by the Public Authorities Protection Act, and they say that, as managers, they are a body appointed for the execution of the Education Act, and are responsible for carrying it out, and for carrying out the public duty—namely, the education of children. Whatever the position of the managers of the school before the Act—they as a rule being trustees under a trust deed—since the Act, its express provision that " All public elementary schools not provided by the local education authority shall have a body of managers consisting of a number of foundation managers not exceeding four appointed as provided by this Act . . ." seems to put the managers in the position of a body who are a statutory body. The foundation managers—who are to be four in number, or not exceeding four—who form that statutory body are to be, according to sect. 31 :

> . . . managers appointed under the provisions of the trust deed of the school, or under an order made in pursuance of this Act or the Education Act, 1902, s. 11, or under the trust deed of the school as modified by any such order.

Thus, although the managers were in existence before the passing of this Act, by the passing of the Act, those managers, trust managers under the trust deed, become foundation managers appointed by the Act of Parliament, and, in my view, they are therefore a statutory body in that sense. The question I have to decide is whether or not they are a statutory body, to whom is entrusted the carrying out of the Act of Parliament, for the purposes of carrying out the Act of Parliament, or carrying on a public duty. The allegation in the pleadings is that they were in default, and that they failed properly to execute the Act of Parliament, or failed in their public duty towards this little boy. The managers, and of course the headmistress, who is the person appointed to carry out the discipline and supervision of the children, are appointed to manage the school. For the purposes of carrying out the Act, supervision, instruction, and discipline, are part of the things which the managers, with the assistance of the headmistress or head teacher, have to provide. Part of the secular instruction of the school includes recreation, and, in my view, not only is there cast upon the managers a public duty to manage the school, which includes the supervision of the children, but also they are persons appointed to execute the Act of Parliament. Reference was made by counsel on either side to *Bradford Corpn.* v. *Myers* (1), and the question which I have to decide in this case seems to be put very clearly by Lord Atkinson in the opinion he gave in that case. The facts of that case were that the Bradford Corporation were bound to supply gas to the public, and they were also empowered to sell to anybody they chose, or to get rid of (and sale was one of the most obvious methods of getting rid of) the coke which was the product of the gas works. In that particular case, having contracted to sell a load of coke, in the course of delivering it, they acted negligently, causing A damage to the respondent in the appeal, Mr. Myers. They pleaded the Public Authorities Protection Act, and the House of Lords pointed out that in selling coke they were not carrying out a public duty at all, and that, although they were bound to supply gas to the inhabitants of the district, a public duty being cast upon them to do that, the sale of coke B was not a public duty. LORD ATKINSON puts the question to be decided, in my view, very clearly, at p. 252:

> The appellants had sold this load of coke to the respondent, to be delivered by them at his premises. Now, negligence is a breach of duty. To give a cause of action the duty must be due from the defendant to the plaintiff. And in my view this case turns upon the nature of the duty owed by the appellants to the respondent C for the breach of which the latter sues. Was it a private duty created by the specific contract entered into between the parties for the sale and delivery with reasonable care of this load of coke, or was it a public duty within the meaning of the Public Authorities Protection Act, 1893, s. 1? The appellants contend that this statute applies, and that, owing to the lapse of time, the action is unsustainable.

Applying that question to this case, I have to ask myself, how does D this duty of supervision, a breach of which is alleged in the statement of claim, arise? I think that the answer clearly is that it arises under the Act of 1921. It arises owing to the Act. There is a failure to perform the duty imposed upon the managers properly to carry out the Act, or properly to carry out the supervision, and to carry E out the duty which was imposed upon them by the Act. In those circumstances, it seems to me that the default complained of is a default which is covered by the Public Authorities Protection Act. For the plaintiff, it was contended that this is not a public duty, but merely a private duty owed by the managers to the particular child. I do not F think that that is right. I think that it is a duty owed by the managers to all the children attending that school. Whether or not every child in the area has got to be taken into that school does not seem to me to matter. If there is a duty to all the children who attend the school, that seems to me to be a duty owed under the Act of Parliament, G and it is a public duty, which is protected by this Act. A distinction at one time seems to have been drawn. The case of *Parker* v. *London County Council* (2) was quoted. That was a case where the defendants, acting under statutory authority, worked a tramway. An accident occurred in the working of the tramway. At one time it seems to have H been thought that the Public Authorities Protection Act, although it covered the undertakers in the construction of the tramway if they were guilty of any default in the construction, would not cover any default such as negligence towards a passenger. I mention the case only because that sort of distinction, I think, was endeavoured to be made in this case. The case of *Parker* v. *London County Council* (2) is referred to in *Bradford Corpn.* v. *Myers* (1). Channell, J., tried that case, and it was held that the London County Council were entitled to rely upon the Public Authorities Protection Act. I might add that, as far as the headmistress is concerned, I am quite satisfied that she was put in authority by the managers, and therefore she was in very much the same position as that in which the officials of the county council were, or the district council in *Greenwell* v. *Howell* (3). Therefore I come to the conclusion that, on the preliminary point, my decision must be in favour of the defendants, and they are protected by the Public Authorities Protection Act.

Solicitors: *Exton & Southworth* (for the plaintiff); *Eric G. Floyd* (for the first defendant); *Sir George Etherton* (for the second defendants).

[*Reported by* M. D. Chorlton, *Barrister-at-Law.*]

LLOYD *v.* LLOYD AND LEGGERI.

[Probate, Divorce and Admiralty Division (Langton, J.), **March 22, 23, April 5, 6, 7, 1938.**]

Divorce—Connivance—Knowledge—Contemplation of possible future adultery—Wife allowed to be in circumstances of temptation—Husband's inaction—Volenti non fit injuria.

The petitioner was a divorced husband at the time of his marriage to the respondent, and the respondent, a widow of 34 years of age, had been the mistress of two men. The adultery upon which the petition was founded took place during the period July, 1935, to Oct., 1936. The respondent had gone to the co-respondent's house in the position of a housekeeper some time before July, 1935. During the period in question the respondent had for short periods returned to her husband, and they had at such times lived as husband and wife. It was admitted that the husband was aware at the time of his wife's adultery. The respondent contended that the petition was barred by reason of connivance:—

Held: the petitioner, being fully apprised of what was going on, took no active steps to prevent it and therefore acquiesced in it. There had been connivance on the part of the petitioner, and the petition should be dismissed.

[**EDITORIAL NOTE.** The judgment herein fully considers the cases on connivance upon the question whether there must be an intention that adultery shall take place. It has been said that mere passive acquiescence or toleration is not sufficient, but there must be an intention or expectation of the act. The judge has here held that a wilful abstaining from taking active steps in the case of a wife known to be morally weak and placed in circumstances of temptation amounts to connivance, although it cannot be shown that there was any definite intention on the part of the husband that adultery should take place.

As to Connivance, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999; and for Cases, see DIGEST, Vol. 27, pp. 326-332, Nos. 3052-3122.]

Cases referred to:

(1) *Rogers* v. *Rogers* (1830), 3 Hag. Ecc. 57; 27 Digest 327, *3061.*

(2) *Moorsom* v. *Moorsom* (1792), 3 Hag. Ecc. 87; 27 Digest 329, *3082.*

(3) *Crewe* v. *Crewe* (1800), 3 Hag. Ecc. 123; 27 Digest 333, *3133.*

(4) *Phillips* v. *Phillips* (1844), 1 Rob. Ecc. 144.

(5) *Allen* v. *Allen & D'Arcy* (1859), 30 L.J.P.M. & A. 2; 27 Digest 327, *3063*.

(6) *Glennie* v. *Glennie & Bowles* (1862), 32 L.J.P.M. & A. 17; 27 Digest 329, *3087*; *subsequent proceedings* (1863), 3 Sw. & Tr. 109.

(7) *Gipps* v. *Gipps & Hume* (1864), 11 H.L. Cas. 1; 27 Digest 327, *3064*; 33 L.J.P.M. & A. 161; 10 L.T. 735.

(8) *Lankester* v. *Lankester & Cooper*, [1925] P. 114; 27 Digest 328, *3069*; 94 L.J.P. 71; 133 L.T. 349.

(9) *Clayton* v. *Clayton & Sharman*, [1932] P. 45; Digest Supp.; 101 L.J.P. 23; 146 L.T. 327.

(10) *Greenwood* v. *Greenwood*, [1937] P. 157; [1937] 3 All E.R. 63; Digest Supp.; 106 L.J.P. 74; 157 L.T. 168.

(11) *Poulden* v. *Poulden*, [1938] P. 63; [1938] 1 All E.R. 508; Digest Supp.: 107 L.J.P. 27; 158 L.T. 231.

PETITION for divorce by husband on the ground of the wife's adultery with a named co-respondent. The respondent and the co-respondent filed answers denying adultery. The respondent's answer contained in addition allegations of connivance and conduct conducing against the petitioner.

J. J. Davies for the petitioner.

John Russell for the respondent.

Acton Pile for the co-respondent.

LANGTON, J.: This case has raised a point of some nicety as to the exact limits of the doctrine of connivance, and as to the application of that doctrine to the facts of the present case. The parties in the case are, I would like to believe, of unusual character, by which I mean that the views which they both openly express upon subjects of private morality are so lax that I both hope and believe that they do not represent the views of any large portion of the community. It is comforting to reflect that no one is wholly vile, and I am glad to be able to say this at least in favour of both parties, that one of them at least struck me as a completely honest individual—the husband petitioner, Horace Lloyd—and that the wife, for reasons I shall have to detail, painted her character a little blacker than was necessary, and her husband's view of her actions as more lax, more deplorable, than was the truth. As to her own conduct, she was almost embarrassingly frank. At the same time, I have borne in mind the fact that she had everything to gain in this case, and nothing to lose, by exaggerating in a small degree her own moral delinquencies.

The husband and wife were married in 1928. They were already experienced people, not only in life but also in matters of marriage and divorce. The husband was already a divorced husband, and the wife, a widow of 34 years of age, on her own statement, had already been living with two men as their mistress. The parties met when the husband was married to his first wife in India as far back as 1921, and the lady claims that at that time she, to use her own expression, had been the acknowledged mistress of a man named Wheeler. I say at once that in matters that depend on memory or personal candour I prefer the husband's evidence to that of the wife. The husband said that he did not know that she was at that time the mistress of Wheeler. When they came to be married, in 1928, the wife says that she was the mistress of a man who has been referred to throughout as Ben, who was a solicitor, now dead. Perhaps it is unnecessary to identify him. She says (I do not accept her evidence in this respect) that her husband knew quite well that she was the mistress of Ben, knew that she intended to continue to be the mistress of Ben, and knew that, at the time when she married him, she was actually planning further association with Ben. If I believed that, of course, there would be no more difficulty in this case. One would have no difficulty at all in a case in which a husband was so complacent as to agree to share his wife with a man who had already enjoyed her in the capacity of a mistress. Such a man could not possibly come to this court with any hope of redress on the grounds of her adultery, to which he had openly and freely assented. Having seen Mr. Lloyd, and having heard him cross-examined at great length, I do not believe that story at all. I think that that is one of the instances in which the wife, for her purposes here, has distorted the true facts, making her husband appear worse than he really is.

The parties after marriage returned to India, and it is not in dispute that when in India, although on fairly good terms with her husband, there was a time when the wife struck up an association with a man of the name of Kazi. There is some dispute as to how many times she committed adultery with Kazi, but there is no disputing the fact that she committed adultery once with him, and that her husband knew of that fact. On the return voyage from India, when the husband was much incapacitated by illness, another man of the name of Martelli paid very insistent court to this wife, Mrs. Lloyd, and again it is not in dispute that Martelli committed adultery with her, and that, at least after the adultery, her husband knew of it. Again, I think, if my recollection of the evidence is correct, Mrs. Lloyd says that she told her husband at least of the fact that Martelli was proposing adultery to her, and that her husband made no objection. Again, I do not believe her. I think she is distorting that incident, and that what really happened was, as in the case of Kazi, that the husband knew only afterwards, and, realising that he had got his wife, to whom he was quite devotedly attached, away from these people, and away from the evil influences of India and the East, hoped that things would be better between them, and that this would be the end of her infidelity.

I accept his version about the whole of that earlier life. It was all exceedingly regrettable. People made of sterner stuff than Mr. Lloyd, people who take a stronger view of morality, might have acted differently from the way in which Mr. Lloyd acted. Up to that point, however, I accept his version of the matters in the East, and there is nothing in his version, as I understand it, that could militate against the relief he now seeks. I mention this because it was quite fairly and legitimately pressed in argument on behalf of the co-respondent, by Mr. Pile, that all those matters were matters which should debar him from relief. When the wife returned to England, about 1932, Mr. Lloyd secured a release from his employment in India, and compounded his rights for a lump sum. This lump sum, some £2,000, he invested, first of all, in a hotel in the neighbourhood of Maidenhead, and, afterwards, in a commercial adventure in the village of Bray. Both these adventures seem to have come to grief, and before very long Mr. Lloyd found himself in the direst financial straits. His wife was a woman of great energy, and sought employment rather than share the very small wage which Mr. Lloyd found was the limit he could command in the labour market at that time. The co-respondent in this case, a Mr. Leggeri, advertised, or Mrs. Lloyd advertised—they were brought together by means of an advertisement—for a housekeeper, and a bargain was struck by which Mrs. Lloyd went to Hill House, Wereham, King's Lynn, Norfolk, in 1935, about the middle of the year, as housekeeper to Mr. Leggeri. Mr. Leggeri is a business man, engaged, and actively engaged, in business pursuits. He was, if not a bachelor, at least a man living alone, and very soon after Mrs. Lloyd went there—there was no one else living in the house—obviously the situation was a perilous one, if Mrs. Lloyd were to be judged entirely by her somewhat chequered past. She was still a lady of prepossessing appearance, and it is not surprising, in the circumstances, that before very long she consented to be Mr. Leggeri's mistress. As to this, I have her own undisputed evidence. She has given evidence in the box upon this matter, and it is the subject of the husband's complaint. Mr. Leggeri, who appears to be in no financial difficulties, and in no difficulties as to health, has elected not to go in the box. No explanation has been afforded to me by his counsel, Mr. Pile, as to why he has made this election. He cannot, therefore, complain, and Mr. Pile cannot seek to complain on his behalf, that the evidence should stand—evidence which he had every opportunity of contradicting, and which he has not chosen to contradict. I have no doubt at all that Mrs. Lloyd—this I do not think she has had any reason to wish to exaggerate—lived as Mr. Leggeri's mistress during the whole time of her sojourn in his house. That would mean that, from some period shortly after July, 1935, until Oct., 1936, she was living in that capacity with the co-respondent. It is not necessary to imagine, and Mrs. Lloyd does not say, that this relationship took place immediately she went there, but, by the middle of Sept., 1935, not only was the relationship established, but it was established to the knowledge of the husband, Mr. Lloyd.

With that unusual background, the case falls for consideration. The case for the respondent is based entirely upon this question of connivance. Did the husband connive at his wife's adultery with Mr. Leggeri, or did he not? True, as I said, it has been based upon general connivance, existing over the whole of the married life, but I have dealt with the earlier portion, and down to 1932, I think, there is nothing against Mr. Lloyd that can be brought forward here in the matter of connivance. I think that it was reasonable of Mr. Lloyd to take the view he did of his wife's infidelities, of which he knew at the time. It must be remembered that I do not find that he knew of her infidelity with Ben. I think that it is right to assume in this case that, as to her infidelities of which he knew at the time, they were all infidelities which had taken place either in India or on the road thereto. He says that the view he formed of her was that she was over-sexed, and that the atmosphere of a hot country or any sojourn in hot weather contributed very largely to the regrettable actions of which she acknowledged she was guilty. He felt, it seems to me again, a reasonable hope that, with the return to England and increasing age (the lady by 1932 was approaching 40 years of age), and with increasing consortium with himself, he might count upon a better relation, and count upon a faithful wife.

I have therefore addressed myself to this case entirely upon this last incident, though not, of course, leaving out of account at all—it would be quite wrong to do so—the earlier history which I have recited. The degree of care which a man might be called upon to exercise with regard to a wife who had a blameless past is, of course, quite different from the degree of care which one would expect him to exercise in respect of a lady of such known proclivities as this lady unfortunately turned out to be. All that background has to be kept firmly in view in weighing and judging the position on the final incident.

When Mr. Lloyd became aware that his wife had become the mistress of Mr. Leggeri, and that she proposed to continue in his service and in that capacity, his attitude was, judged by any standard, a very remarkable one. He was earning at the time a not very large wage for a man who had lived as he had in the past, in circumstances of comfort and plenty—a wage of £3 10*s*. I think was the figure, obviously a meagre position. No one can blame Mrs. Lloyd for striking out for herself and leaving her husband, and for endeavouring to supplement this small income, but, when the husband became apprised of the fact that the way she had chosen to do it was by becoming another man's mistress, one would have imagined that, by any standard of morality, the position called for urgent and drastic action. Mr. Lloyd, however, took no such action. He told me—again, because I judged him to be an honest man, I believe it—that he was shocked when he heard this, and that he said to his wife: "You tried to do this," to which his wife made the rather amazing answer: "Yes; I did it because of his bad opinion of women." Thereupon Mr. Lloyd begged her to give it all up and come back. The lady refused. He said she used to come up once in every two months, and there again it is not in dispute that, when they met, this remarkable husband and wife resumed their relations, and had the ordinary intercourse of married people whilst they were spending the week-end together.

Matters progressed in that way until the middle of 1936, and in June, 1936, he says (and again I believe him) that he was still trying to persuade her to come back. He used the expression: "I hoped until the last." In another portion of his evidence, he said: "I kept on suggesting to her to come back." Further than this suggestion, however, Mr. Lloyd
A seems never to have gone. In fact, at one period, indeterminate in date, his wife having told him that she met in Norfolk, in the society of Mr. Leggeri, a considerable number of business men, and that it might be possible for her to procure employment for Mr. Lloyd through their agency, Mr. Lloyd went so far as to supply her with a very full and detailed
B account of his business experience and capabilities. I have the document in my hands before me, and it has obviously been compiled with the greatest possible care, and with every apparent object of supplying a would-be employer with the fullest information. There is no question of a few jottings and dates. It is a very detailed, lengthy description
C of his whole experience, accompanied by certificates as to the value of his work. Again, an issue arose between the parties in regard to that document, and, once again, I received, on a new day, exactly the same impression of the parties as that which I had before. Mrs. Lloyd admits that she has lost her temper with her husband, and is defending this
D action largely because she dislikes the way in which her husband set about it, in having her personally served in a tea-shop, and making a row, whereby she lost a good lucrative job. Mrs. Lloyd says that Mr. Lloyd, her husband, had fallen so low as to be willing to seek a job in the employment of Mr. Leggeri. To that Mr. Lloyd replies:
E "Nothing of the kind. To begin with, I was not qualified for the job Mr. Leggeri had to offer, and I only gave this document after repeated requests from my wife on the understanding that it was possible that she might get me better, more lucrative employment in that part of the world." Again, I prefer Mr. Lloyd to Mrs. Lloyd. I think his memory
F is much more accurate, and, having seen him, I do not believe for a moment that he is the kind of man who would go and work under a man who was keeping his wife as a mistress. I think that it is only fair to him to say that he intensely disliked the position in which he found himself, and that he endured it, not from any wish or desire for it, not in the hope
G of any gain or reward therefrom, but because his wife was a strong, determined, very self-willed person. He had either to take the final step of threatening divorce or to endure it, as he elected to do. I think, therefore, again, that his version is the correct one, and that he gave her this detailed statement in the hope that she might be able to meet someone
H who would give him the necessary promotion. It does not, put in that light, show Mr. Lloyd in any very desirable setting. I put it to him myself, putting it at the best, that he was not unwilling to profit to the extent of getting better employment through the agency of his wife and her acquaintances, the men who were the friends of Leggeri, and he said, with his usual candour, that he could not escape from that.

Again, Mr. Lloyd does not appear here in a very favourable light.

With all these facts in mind, what I come back to in this case is really a question of law, and the application of the law to the case. Does what Mr. Lloyd did amount to connivance in law, or not ? The determination of this strange relationship between Mrs. Lloyd and Leggeri has a bearing upon the case. In the middle of June, 1936, Mr. Lloyd and his wife, who had been proceeding during the nine months immediately before that upon terms of very great amity and affection, as, indeed, their letters show, had a very serious disagreement. At first sight, the cause of the disagreement seems almost ridiculous to consider. Mrs. Lloyd had arranged with Mr. Leggeri to take a bungalow at some seaside resort for the month of August, and plans were going forward for the occupation of this bungalow. Mrs. Lloyd was to entertain her husband, Mr. Lloyd, at the bungalow during a certain specified period, when he could get his leave, which I think included the August bank holiday. Mr. Leggeri, however, for a reason, I think, connected with some pet animals, insisted that that period should be reserved to him, and, when Mr. Lloyd became aware of the fact that his wife was going to prefer Mr. Leggeri's company to his over the very period for which he had been invited, he seems to have taken a very serious view of that preference, and it emerged during the discussion of this matter that Mr. Lloyd's real view of the whole of these matters was that, greatly as he disliked the position his wife had taken with Mr. Leggeri, he was prepared to endure it, prepared to tolerate it to the extent of taking no active interposition to prevent it, so long as he was personally assured of the fact that his wife still preferred him to Mr. Leggeri. This at first sight seemingly trivial incident brought home to him the fact that in truth and in fact the lady now preferred Leggeri to him. At that time, he made up his mind that, as she now preferred Leggeri to him, there was no point nor use in tolerating the position any longer. He therefore determined to bring divorce proceedings against his wife, naming Mr. Leggeri as co-respondent.

The position as it arises from these facts is, as I see it, this : just how far is a man entitled to overlook his wife's falling from the path of virtue before he takes action ? There is no question of knowledge here at all. Mr. Lloyd acknowledges freely that, from Sept., 1935, and for the succeeding nine months, he knew perfectly well what his wife was doing. It was sought to be argued on his behalf, by Mr. Davies, that what he did on meeting his wife was really to afford her a series of condonations. I cannot accept that argument at all, because I do not think that there was any condonation. Nor do I understand a doctrine of condonation in advance. When Mrs. Lloyd left her husband at the conclusion of the week-end visit, Mr. Lloyd knew where she was going and what she was going to do, and I do not understand at all any suggestion of condonation of adultery that is about to be committed. I do not think it can be argued upon that line at all. Mr. Davies'

strong argument on behalf of Mr. Lloyd was, however, that the cases disclose throughout a general tendency which shows that, in order to constitute connivance, there must be some form of intention. I shall have to review those cases in a moment. Undoubtedly he is right in saying that through those cases there does run the employment of the
A expression "intention." Against that, it can be said at once that the large majority of the cases deal with this question of connivance before the act of adultery was committed, and that very little guidance is to be had from the case-law on the subject in dealing with connivance such as is alleged here, of a continuous series of acts. The question of
B intention before any particular act is committed does not appear to me to have anything like the same force when you are contemplating the attitude of the husband's position before the act occurred. Mr. Russell and Mr. Pile, who, of course, make common cause in this matter, adopt the attitude that intention is not the key, and that any form of toleration
C by a husband amounts to connivance once knowledge is established. For this there is undoubtedly quite clear warrant in the books. Nevertheless, I have not forgotten that the circumstances of this case are very different from anything that was ever dealt with—I think I may say even contemplated—by people who dealt with kindred subjects 100 years
D ago. I have found no case in the books in which the facts bear any relation at all to the present facts. No judge, so far as I know, has been asked to deal with a case in which the lady quite frankly admits that she has been the mistress of three men and had an adulterous association with two others. I have had no case cited to me in which there has been a
E husband who quite frankly acknowledges that he knew of his wife's adulterous associations with two other men, and was quite cognisant over a period of months of her association with the last man, of whom he now makes complaint. Therefore, the balance seems to lie between, on the one hand, this doctrine of intention, and, on the other, the doctrine
F of toleration. Can such toleration as Mr. Lloyd accorded to this union between his wife and Mr. Leggeri be qualified as anything other than connivance? As nearly as I can state it, that seems to be the issue to which I have to direct my mind.

As a rule, I endeavour to avoid lengthy citations from authorities in
G dealing with matters of this kind, because a little further study very often enables one to condense one's citations, and makes the matter easier for a court of review. However, acting, as I am in this case, under the spur of necessity, in view of what I think is due to the parties, I shall have to review these cases at some considerable length.

H The first case cited to me is *Rogers* v. *Rogers* (1), the judgment in which was given by SIR JOHN NICHOLL, who said, at p. 59:

> Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime; but on the other hand it has always been held that there must be a consent. The injury must be *volenti*—it must be something more than mere negligence; than mere inattention; than over-confidence; than dullness of

> apprehension ; than mere indifference. It must be intentional concurrence in order to amount to a bar. Thus in *Walker* v. *Walker*, Lord Stowell, after stating that the adultery was fully proved ; that the intercourse was for a long time carried on with considerable secrecy, proceeded :—" The defence is not a denial of the fact, but that which, if established, is said to be equivalent in law. It is said that the husband connived ; but they do not impute active means, but a passive consent. I take the position laid down by Dr. Arnold, to be the true doctrine—that passive consent is sufficient ; but there must be a consent, an acquiescence of his will ; not mere negligence ; not too high a confidence, or a misplaced confidence :—there must be evidence that he was passively concurrent ; that he saw the train laid for the corruption of his wife ; that he saw it with pleasure, and gave a degree of passive concurrence to it."

That first passage I cited indicates, I think, just how difficult it may be to apply this doctrine. Sir John Nicholl says : " Passive acquiescence would be sufficient to bar the husband. . . ." Take that phrase by itself. No one would contend for a moment that, in the ordinary meaning of language, Mr. Lloyd had not been guilty of passive acquiescence. That is qualified, however :

> . . . provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime. . . .

Obviously, the judge is contemplating an act of adultery to come, and it needs only passive acquiescence in an adultery which he sees is likely to happen, which is not in any sense the present case. Then he goes on to say : " . . . it has always been held that there must be a consent." Immediately, of course, it can be argued on behalf of Mr. Lloyd that he never consented at all. Consent was never asked in any sense, nor did he ever, after the fact, in terms consent at all. Then the passage goes on : " The injury must be *volenti*—it must be something more than mere negligence." One takes those two phrases together, and sees that there is very little guidance there to the present case. I gather that to mean that the doctrine of *volenti non fit injuria* is to be applied here, just as one would apply it in the law of negligence, and, in the law of negligence, when one applies that maxim to a particular case, one means that the person against whom it is being applied is a person who had every possible means of knowledge, and every possible means of preventing the danger which seemed to be approaching. Having taken no steps to prevent the danger, the party is said to be *volens*—that is, to be a party who has been willing in that limited sense. Take the case of a motor car. I understand the doctrine to mean this. If a person in the car sees the driver driving at a quite immoderate speed and makes no protest at all, knowing well of the danger, he cannot afterwards be heard to complain that the driver went too fast. That does not mean that *volens* is to be translated as saying the party willed it in the sense of a wish that the man should drive at that speed. It means only that it was a consent in the sense that no steps were taken to protest, or to stop the danger which was seen to be coming. When one passes on to the quotation from Lord Stowell on that page, again the guidance is not great. He talks of passive consent—that there must be evidence in this consent or concurrence of the fact that he saw with pleasure what was

about to happen with his wife. I cannot believe that the particular emotion disturbing his breast by what he saw can be any real criterion of connivance. I should have thought that it would be quite sufficient if he contemplated an adultery that was possible in the future, and allowed it to happen, even though he might have regretted the fact
A that it was going to occur. In a later passage in *Rogers* v. *Rogers* (1), SIR JOHN NICHOLL, quoting from the judgment of the court of LORD STOWELL in *Moorsom* v. *Moorsom* (2), says, at p. 107 :

> However, though to bar the husband there must be intention on his part, I have no difficulty in saying that mere passive connivance is as much a bar as active
> B conspiracy.

That statement, taken by itself, of course, again puts Mr. Lloyd, in my opinion, completely out of court. I find it very difficult to read the expression " mere passive connivance " as meaning anything other than standing by, standing by without taking any active step to interfere.
C It is said with force by Mr. Davies in this case that his client was limited in the actions he could take. He had very little money, he had no control over his strong-willed and completely independent wife, he could not physically prevent her from going to Mr. Leggeri, and, of course, he had always open to him the action which he eventually took.
D He was always in a position to be able, first, to threaten her with divorce, and to threaten Leggeri with divorce, and, secondly, if the threat were unavailing, to sue for divorce. When in truth and in fact he did take this action, Mr. Leggeri did not desire to figure in a divorce for the sake of his housekeeper, Mrs. Lloyd. One cannot avoid the conclusion
E that, had the action been taken earlier, it would have had exactly the same result. It is impossible to argue that there was nothing Mr. Lloyd could have done, and, indeed, one is driven here to contemplate the question whether a man can ever be entitled to say, as Mr. Lloyd appears to have said to himself : " The mere matter of adultery does not seem to
F me to be of crucial importance. Of course, I greatly dislike my wife committing adultery, and wish she would not do it, but I am not going to part company with her, nor to seek the assistance of the divorce court, on that ground. I will wait and see whether I can get her back, and whether my circumstances will not improve." Can he, to put it
G in another way, make his own law in the matter, and say : " The test with me is whether her affection has changed, not whether she commits adultery, and I will ask the court to give me a decree on the ground of adultery when I find what I really care about—namely, in the first place, that her affection has not been taken from me " ? That is not,
H as I understand it, the law of England. A man comes here for the remedy of a wrong. The wrong is adultery, and it would be going further, as I see it, than I have ever yet seen any judge go to say that a man may take the law into his own hands in this matter, and make his own selection of what he thinks to be the real grievance that enables him to come here.

To proceed with the consideration of the cases, Sir John Nicholl says, at p. 71 :

> I have already noticed that, to amount to connivance so as to bar the husband, there must be circumstances fixing upon him "intentional concurrence."

The word "intentional" occurs frequently in subsequent cases, and I
read that term "intentional concurrence" as being knowledgeable A
concurrence. However, it is difficult to determine with any precision
the exact value to give to this word "intentional." It seems to me that
one can make these cases consonant with one another if one reads the
word "intentional" as meaning either intentional in the simple sense
of knowing, promoting and encouraging a thing to happen before it B
happens—of course, those are the majority of cases where the alleged
connivance is in advance of the act—or, perhaps, in the somewhat more
philosophical sense, of knowledgeable concurrence, concurrence with
intention, in the sense of knowledge of all the circumstances. Read in
either of these senses, some of the cases in one and some of the cases C
in the other, the cases do not seem to me to be very much in issue with
one another.

In *Moorsom* v. *Moorsom* (2), the judgment was given by Lord Stowell, who said, at p. 107 :

> The presumption of law is against connivance ; and if the facts can be accounted D
> for without supposition of intention, the court will incline to that construction.

Later on, he says, still on p. 107 :

> However, though to bar the husband there must be intention on his part, I have
> no difficulty in saying that mere passive connivance is as much a bar as active
> conspiracy ; he would be *particeps criminis*. E

There again, where one can get a really clear and unexceptional statement,
this statement seems to be that passive connivance is a bar. By that
I understand Lord Stowell to mean that, if a man stands by and takes
no steps to prevent the commission of adultery by his wife, the mere
fact that he may dislike it, or may even request her to desist, does not F
relieve him from the stigma of passive connivance. Again he says,
at p. 107 :

> The expression of the books, of a man prostituting his wife, is too strong, but the
> rule is, *volenti non fit injuria* ; that is the true principle : active or passive, the
> husband is not the object of legal relief. G

The next case, the case which was pressed upon me very closely by Mr. Pile, is *Crewe* v. *Crewe* (3), again the judgment of Lord Stowell. The important passage begins at p. 131 :

> Another ground of objection is, the connivance or toleration of the husband. H

It is interesting to observe that it is at this stage that the word "toleration"—a simple and easily understood expression—first comes into this line of cases. Lord Stowell continues at pp. 131, 132 :

> He may have an insensibility to his own honour, and, from a conformity to the corrupt manners of the world, may have no wish to pursue a legal remedy, or may

> not think it worth pursuing; and if such a person, after a long continuance of toleration, of himself awakes, or is compelled by the clamour and outcry of the world to awake, he awakes too late. If the adultery has gone on for a length of time he does not stand before the court in the favourable light of a person acting on the spur of honest feeling, whom the law delights to succour; he has made up his mind to some other satisfaction. I do not mean by this to say that the husband is immediately to rush into court upon suspicion; he must wait for adequate proof; but he is to show his vigilance; he is not to lay by longer than to obtain proof: if he does, his lethargy will be fatal to any application that he may make: whatever his motives may be for coming afterwards, if it be proved that there has been a long course of criminal conduct of which he was cognisant, or of which, by law and by presumption he must be supposed to have been cognisant, he cannot receive relief.

That passage occurs in a judgment that was delivered nearly 140 years ago. I am not certain that every word of it could, or would, be supported now. One has to make allowances for the cases in which, under, perhaps, the somewhat laxer code of morals, a husband, just as a wife, may be meritorious in overlooking delinquency on the part of the other spouse, and in condoning it perhaps for the most desirable purpose of keeping a home for the children. Therefore, I am not sure that I would wish to indorse every word of that passage as being the law of England as it may be applied in all its severity to-day. From Mr. Lloyd's point of view, there is a good deal in it. It seems to me to strike very hard at his method of defence:

> He may have an insensibility to his own honour, and, from a conformity to the corrupt manners of the world, may have no wish to pursue a legal remedy . . .

That may be a slightly grandiloquent way of describing Mr. Lloyd's actions during the months of Sept., 1935, to Oct., 1936, but it is difficult to see in what respect it differs. The judge suggests that the man whom he is here contemplating as tolerating his wife's adultery may have made up his mind to some other satisfaction. Mr. Lloyd appears to have taken the view that, if he could get his wife back in the end, it was worth while. He was not shutting his eyes to it—that would be putting it too high—but tolerating his wife's infidelity for the time being. The decision there seems to be applicable to the present case. Is it fair to say that Mr. Lloyd was guilty of lethargy? It certainly is a toleration of a very lengthy and a very complete kind. I mention it because of its application here. I think it is not in dispute that the parties continued their marital relations when they met. It is said that that may not seem to be a matter of crucial importance if one tries to approach the matter from Mr. Lloyd's side, and I have tried to approach it from both sides. There is something to be said for a man who is endeavouring to win back his wife. Mr. Lloyd's attitude was: "Well, if we continue relations when we meet, there is some chance that she will return." Against that, it is quite obvious that toleration becomes contentment. In such a case, it can hardly be said that the husband was really strongly disapproving, if he was for all this time content—or perhaps that word is too strong—prepared, prepared to share his wife with another man. The outlook of such a man is perhaps difficult to gauge. It seems to me impossible to say that that toleration which reaches such a pitch is not such lethargy as to be struck at by the words in this judgment. Again Lord Stowell in *Crewe* v. *Crewe* (3), goes on to say, at p. 133 :

> I come then to the next head of objection, viz., connivance or toleration for other purposes : and this is the part of the case which presses with most force. By toleration I mean that passive sufferance of adultery for a length of time, which, in law, enures to a waiver of legal remedy. The proof of this is difficult enough ; for it must arise in general not from a positive act, but from negative conduct— A
> inactivity.

Again I would point in this case to what is the cardinal factor in Mr. Lloyd's conduct—inactivity. Lord Stowell continues :

> If information were proved to have been conveyed to him, that would be decisive ; and if there be nothing of that kind, still the circumstances may be so strong as B
> to raise an almost certain presumption, that he has seen ; and, if seeing, has tolerated.

Of course, he was dealing there with the question of knowledge, but Lord Stowell seems to assume that, once the husband knew what was happening to his wife, as far as connivance was concerned, if he was C
any longer inactive, the matter was almost at an end.

I now pass from that stage of the matter to a later time, in which the matter was all reviewed by Dr. Lushington in *Phillips* v. *Phillips* (4). The passage that has been pressed upon my attention occurs at p. 157, where Dr. Lushington says : D

> The proposition is, whether a culpable indifference (with a previous knowledge of great indiscretion on the part of the wife) to circumstances which ought to have called forth active interposition, but where the cohabitation continued, and nothing was done, is in the eye of the law connivance—conduct to bar a separation *a mensa et thoro*. I need not say, that it is my duty to consider, not what I conceive the law ought to be, but what it is, and that I must gather from previous decisions—an investigation, I am sorry to say, not altogether satisfactory, perhaps from the very nature of the subject, and the nice shades of distinction that may occur, the E
> difficulty may be inherent.

That passage at least has some comfort for subsequent judges who have to deal, not only with the pronouncements that preceded Dr. Lushington, but sometimes also with the varying pronouncements which fell from Dr. Lushington himself. He then proceeds to deal with practically F
all the cases, such as *Rogers* v. *Rogers* (1), *Crewe* v. *Crewe* (3) and *Moorsom* v. *Moorsom* (2), which I have already reviewed. He introduces some little difficulty in the matter at the end of his judgment by saying, at p. 164 :

> . . . I wish it to be clearly understood, that the ground of my so doing [that G
> refers to the decree which he has just pronounced] is, that I do not find corrupt connivance proved in this case. There must be knowledge, or presumed knowledge, of adultery, or improper familiarities leading thereto ; not finding any evidence of this description, I pronounce for the separation.

Very great trouble was at one time introduced into the law of negligence by the interposition of the adjective " gross," and I think it was H
Lord Esher, M.R., who did one amongst many signal services to the law by making the observation that, so far as he was concerned, gross negligence was negligence with an epithet, and that there was no difference, therefore, in law between negligence and gross negligence. I cannot see that the matter here is clarified by the introduction—I do not

know that DR. LUSHINGTON was responsible for it—which runs through several of the cases, of the word "corrupt." What the difference between connivance and corrupt connivance is I do not pretend to know. I rather suspect, though I say it with the deepest respect for people who used the expression before me, that corrupt connivance was connivance A with an epithet. One lesson that can perhaps be usefully drawn from that case is that again the judge seems to have laid the greatest possible stress upon knowledge, and he obviously decided this particular case in the way he did because knowledge was, in his opinion, absent.

Some fifteen years later comes *Allen* v. *Allen & D'Arcy* (5). The B case was tried by HILL, J., and a jury, and the report contains apparently a full and verbatim account of the judge's summing up. He gives his directions to the jury in these terms, at p. 4 :

> To find a verdict of connivance, you must be satisfied from the facts established in evidence that the husband so connived at the wife's adultery as to give a willing C consent to it. Was he, or was he not, an accessory before the fact ? Mere negligence, mere inattention, mere dullness of apprehension, mere indifference, will not suffice ; there must be an intention on his part that she should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife's adultery—whether that state of things was produced by the connivance of the husband or independent of it—and if the husband, intending that the result of adultery should take place, did not interfere, when he might have done so, to protect his own honour, he was guilty of connivance.

D

That case was really the highwater mark of Mr. Davies' argument on behalf of Mr. Lloyd. It has to be observed that it was a direction to a jury who were dealing with a special case in special circumstances, and that it may well be, therefore, that the judge was stressing the question E of intention for purposes specially connected with the case. If it is intended thereby to lay down as a matter of law that there is no such thing as connivance unless the husband actually intends, in the sense of desiring, indeed, of being ready to promote, adultery, then I do not accept that as being a correct statement of the law. It seems to me F entirely at war with all the citations I have made from LORD STOWELL and SIR JOHN NICHOLL, and, indeed, with subsequent pronouncements on the subject. I think that it is possible to read it in the way I suggested—that the "intending" there is meant only if the husband had knowledge of, and passively acquiesced in, what was going on. However, G I must, of course, agree with Mr. Davies' argument that the ordinary meaning of the words he used hardly seems to be sufficiently explained by that interpretation.

Another case about the same time is *Glennie* v. *Glennie & Bowles* (6). There SIR CRESSWELL CRESSWELL says, at pp. 19, 20 :

> H I feel no doubt or difficulty as to the judgment which I ought to pronounce. I have to deal with two questions of fact as well as with the question of law, as to the true meaning of the word "connivance." In dealing with the questions of fact, I am not quite in the same position as a jury. I cannot, with propriety, give a general verdict one way or the other without referring somewhat to the evidence upon which it is founded. [His Lordship then examined the evidence as to the adultery, and said that he was of opinion that the charge was established beyond reasonable doubt. He continued.] Then comes the question as to connivance. On the subject of connivance no language can be stronger than that used by DR.

> Lushington in *Phillips* v. *Phillips* (4). In his very elaborate and learned judgment, Dr. Lushington adopts the language of Lord Stowell, which was also very remarkable, and concludes with these words: "When I find Lord Stowell using the following language, I think I may consider myself, whatever be the consequences, justified in my decision. 'In pronouncing for a separation, I feel that I shall tolerate a negligent inattention to marital duty, and that I shall pronounce a decree which will not lead to the peace and honour of families nor to the purity of private life.' If such consequences did not deter Lord Stowell, much less should they deter me, foreseeing as he did, and lamenting as I do in common with him, the effects they may have in matrimonial life." I find that language fully justified by the opinions of Sir John Nicholl in *Rogers* v. *Rogers* (1), and of Lord Stowell in *Moorsom* v. *Moorsom* (2). If it needed corroboration, it would be found to have been adopted by the Full Court in the elaborate summing up of Hill, J., in *Allen* v. *Allen & D'Arcy* (5). I think that to establish connivance it is requisite, not that the party conniving should be actually an accessory before the fact, so as to have taken any active measures to bring about the result of adultery, but that he should be cognisant that such a result would follow from certain transactions that he approved of and consented to; and, therefore, on the principle *volenti non fit injuria,* he cannot complain of any act he passively assented to. And unless it can be said that the petitioner in this case did actually show by his conduct that he expected and intended that the consequence of adultery between his wife and the co-respondent should result from their acquaintance, I cannot say that he connived at their adultery.

There again the principle of *volenti* is brought in, and brought in, as I understand it, upon the assumption that I have already considered. The judge seems to consider that, if the petitioner was really cognisant of what was happening, or what was likely to happen, he could not be heard to complain of the result.

Later still comes the case of *Gipps* v. *Gipps & Hume* (7). There is a valuable opinion from Lord Westbury, L.C., in which he uses this language, at p. 14:

> The next question is, what are the legal force and effect of the words in the section "conniving at the adultery"? The word "conniving" is not to be limited to the literal meaning of wilfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur. Still more must "conniving at" include the case of a husband who, having discovered the adultery of the wife, takes a sum of money from the adulterer upon an engagement not to complain of the acts of the wife, but to abandon his legal remedy, and then leaves the wife in such a situation as cannot but facilitate the continuance or renewal of the adulterous intercourse.

The second clause, I am glad to say, has no application to this case. There is no suggestion which I could for a moment accept that Mr. Lloyd really obtained any advantage. I think that there was a suggestion that vegetables, or something of the kind, had been sent to him from the country. I put that aside as being quite irrelevant to what I have to consider. The first sentence I have quoted here, coming from the high authority of Lord Westbury, L.C., is, of course, a matter of the greatest importance. I have to consider, with this in mind, whether or not Mr. Lloyd did acquiesce in, by wilfully abstaining from taking any active steps to prevent, an adulterous intercourse which he could not but believe, or reasonably suspect, was likely to occur. If one looks at Mr. Lloyd's situation when he had become fully apprised of what was going on, it is very hard indeed to say that he did not acquiesce in, by wilfully abstaining from taking steps to prevent, what he knew was going to occur. He knew that his wife was going back to Leggeri. He knew that she would commit adultery again when she went back. In fact, he appears to have put no term in his mind to the duration of this intercourse, and he struck in the end only because, as I say, according A to the code which he made for himself, which forms no part of the law of England, as I see it, he conceived that, when her affections had passed from him, he was entitled to a divorce, although he had never thought it worth while to ask for one when she began to his knowledge to commit adultery. Taking, therefore, this case, and the definition given as the B nearest thing I have had to the definition of connivance, it seems to me that this case falls within the definition by LORD WESTBURY, L.C., of connivance.

I have had pressed upon me passages from the judgments or opinions of the other Lords who gave their opinions. LORD CHELMSFORD said, C in *Gipps* v. *Gipps & Hume* (7), at p. 27:

> Connivance is a figurative expression, meaning a voluntary blindness to some present act or conduct to something going on before the eyes, and is inapplicable to anything past or future. If a husband, ignorant at the time of the wife's infidelity, afterwards discovers it, and leaves it unnoticed and unpunished, whatever may be the motive of his silence, even if it be the base and sordid one of making a profit D out of his dishonour, he cannot be said to connive at the past adultery, much less at any future intercourse of the guilty parties.

I must say, for my own part, that I have far less confidence in that definition of connivance than I have in the first definition that I have quoted, from the opinion of LORD WESTBURY, L.C. I cannot help think- E ing that, if one takes this opinion at its face value, it must be concerned with a case not in the least parallel with the case I am considering now, but a case in which the adultery complained of was quite independent of any subsequent adultery on the part of the other spouse. I cannot imagine for a moment that anyone can have intended to lay down that, if a man F knew his wife was in close intimate adulterous association with another man, he could not be said to connive at her adultery in future if he allowed that relationship, that close intimate relationship, to continue without any interference upon his part. I think, therefore, that that passage in the opinion of LORD CHELMSFORD is explicable only upon a G conception of facts widely different from the facts I have to consider here.

Coming to modern times, there are two very useful decisions of LORD MERRIVALE, P., which point to the importance, in this question of connivance, of considering the *bona fides* of the person whose conduct is in ques- H tion. In *Lankester* v. *Lankester & Cooper* (8), the parties sought a divorce in the United States. They resided together in the state of South Dakota long enough to be able to obtain a divorce, and then, having complied with the very meagre requirements of the law of that state for the purpose of securing a divorce, the wife, having obtained a decree, remarried. LORD MERRIVALE, P., in dealing with the case when the husband brought his petition and sought to allege the cohabitation of the spouse with a man in South Dakota after the decree, said that the conduct of the husband, in his view, amounted to connivance, and to being an accessory to the adultery of which he was complaining. What the husband apparently had done was to get some contrary opinion, not at all from a likely source, and probably with no faith in it at all, and to have taken this A course as a means of seeking the easiest relief. It is not surprising, in the circumstances, that LORD MERRIVALE, P., declined to believe that the petitioner in that case was acting with any *bona fides* concerning this divorce in South Dakota, and accordingly held that he had connived at this cohabitation of his spouse with another man subsequent to the B decree, of which he was then complaining in the British court.

In *Clayton* v. *Clayton & Sharman* (9), LORD MERRIVALE, P., distinguishes the case very sharply from that of *Lankester* v. *Lankester & Cooper* (8). In that case, the *bona fides* of the petitioner was, in the view of LORD MERRIVALE, P., firmly established. He was satisfied that the petitioner in C that case was acting in perfect good faith in getting an American divorce, and, when he subsequently learned, very little to his surprise, that the American divorce was of no avail, and that it so happened that his wife had subsequently married another man, LORD MERRIVALE, P., allowed him to plead that cohabitation as cause for a divorce in this country, and D declined to find connivance against him.

Then I come to a decision of my own in *Greenwood* v. *Greenwood* (10). In that case, which was again one of very exceptional circumstances, the wife had been perfectly cognisant for upwards of 15 years of the fact that her husband was committing adultery with another woman, E had made a series of arrangements with her husband varying, I think, from deeds of separation to payments by lump sum, and had wilfully shut her eyes, or, in the expression used by LORD STOWELL and SIR JOHN NICHOLL, found some other means of satisfaction. She had taken the view that the question of adultery was really not a matter of import- F ance to her, so long as she could obtain proper means of subsistence, and, after having taken that view for 15 years or upwards, she found herself destitute. It was an exceedingly sad case, and she came here in desperation, saying that she had found herself destitute, and that she now felt herself driven to rely upon the adultery of her husband. She G was a perfectly *bona fide* person, who gave her evidence with the greatest candour. In that case, I had no doubt whatever that I must refuse her petition, because obviously the line which she had taken throughout was a case of conduct conducing, conducing to such an extent that I could not possibly exercise any discretion of the court in her favour. H I put the ground upon undue delay. This was a delay of 13 years or more, and it could not possibly be said that a person coming in that way came before the court with any amount of merit. However, I dealt with the question of connivance, and expressed my view—I see no reason to dissent from it now—that that case was really a case amounting to connivance. There was a woman who knew, and, knowing her remedy, fully elected for a long period of years not to take it. In other words, to use the expression used by LORD STOWELL, she tolerated, and, having tolerated for a long period of years, she could not, in my judgment, be allowed to come and change her view, and say that, having tolerated for a long time, she now wished to take the opposite course.

Finally, in *Poulden* v. *Poulden* (11), BUCKNILL, J., dealing with the first case of the kind, I think, under the new Act, pointed out that the Act had the effect of changing the burden of proof in matters of connivance. I mention this only because the case was brought to my notice, and properly so, and not because the case has either any bearing or any substantial bearing upon the difficult point that I have had to determine. I think that no one can possibly doubt that the judge's statement of the law is correct, and that, whereas before the Act was passed the burden of proof in a matter of connivance alleged by the respondent lay upon the respondent, that burden is now shifted, and, where the circumstances of the case suggest connivance, the burden is upon the petitioner to satisfy the court that connivance does not exist. I would venture to say, in regard to that case, two things only: first, that I am not altogether sure that the law has been greatly changed by this Act, but I concur entirely with the statement by BUCKNILL, J., of the law as it stands to-day; secondly, I would desire to reserve my opinion as to any question of presumption of law having been changed. I do not think that it is at all necessary for me to deal with that point here, but, as the case is reported, it might almost seem to suggest—though the judge certainly does not say it in terms—that there was now a presumption of law in favour of connivance. I should wish to hear the matter very fully argued before I subscribed to that doctrine. As it has not been argued here, and as it does not fall as a matter of importance in a question that is already sufficiently difficult, I will say nothing further about it.

Now that I have reviewed the cases, the matter stands in this way. Is this toleration for nine months on the part of Mr. Lloyd fatal to his case? As I understand the law of connivance, it is fatal to his case. The lady, the respondent in this case, comes before the court with no merits at all. It is only fair to say that she has not claimed to have any.

She would be entitled to a pension from the India Office if she were a widow. If her husband died before her, then, in her old age, she could reclaim her pension.

The motive inspiring her so far as that is concerned is even less powerful than I imagined. That leaves her in this position—that, though she has perhaps a less sordid motive in defending this case, she has an even less substantial motive. Indeed, her only reason for defending the case, as she says, is that she dislikes the way in which her husband has set about the business of divorcing her. If he had set about it in a manner that commended itself to her, she would have been quite willing to pay the proper penalty for her manifold delinquencies. I have not, therefore, been impelled to the course I have taken by any kind of sympathy for the respondent. She has claimed none, and she has received none at my hands. I am concerned only with the question of Mr. Lloyd's conduct from the point of view of the law of this country, and, laying it down as best I can, it seems to me to amount to this—that a man may not stand by and tolerate his wife's adultery, meeting her, conversing with her, having intercourse with her, as this man did, and thereafter, because of some private view of his own as to what a woman owes to her husband, complain of her violation of that private view and come here to seek a remedy at the hands of this court. I think I have no option in this matter but to say that this petition fails to surmount the fatal bar of connivance.

Petition dismissed. Order for wife's costs limited to amount of the security as extended. No order as to costs as between petitioner and co-respondent.

Solicitors: *O. L. Blyth* (for the petitioner); *O. L. Richardson* (for the respondent); *L. Bingham & Co.* (for the co-respondent).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

Re SALVIN'S INDENTURE, PITT *v.* DURHAM COUNTY WATER BOARD.

[Chancery Division (Farwell, J.), **April 6, 12, 1938.**]

Water Supply—Pipeline constructed by agreement—Easements—Pipes passing through land not contiguous to reservoirs or works—Whether easement in gross.

The defendant board became in 1920 the successors of the Weardale and Shildon District Waterworks Co., which had been incorporated by statute in 1866, its powers being extended by Acts of 1875 and 1879. Under the 1879 Act the Weardale Co. acquired the right to lay a line of pipes along a line shown on a deposited plan, with a permitted deviation. In 1880 it became necessary to lay pipes through land belonging to the predecessor in title of the present plaintiffs, and, as this could not be effected by exercising its rights under the 1879 Act, the land being outside the permitted deviation, it entered into an agreement whereby, in consideration of the payment of a yearly rent charge of £3, the company was granted the right to lay pipes through this land. This land subsequently passed through several hands, during which the yearly payment of £3 was regularly made, until finally it became vested in fee simple in the plaintiffs. They contended that the grant was not binding upon them, as the acquisition of the rights thereunder was *ultra vires* the company, and that it had never been enforceable. Alternatively, they contended that it was merely a personal licence, not binding on the grantor's successors, and that, as there was no dominant tenement contiguous to the land in which the pipes were laid, it was an attempt to create an easement in gross:—

Held: (i) as the consent of the owner of the land to the laying of the pipes was obtained by agreement, and not by compulsion, the company was not acting *ultra vires* in acquiring the rights under the grant.

(ii) the undertaking of the company consisted of corporeal hereditaments, namely, land for the erection of reservoir and other similar purposes, and incorporeal hereditaments, namely, the rights required in the land of others to lay pipes and for other purposes and so was capable of being a dominant tenement in respect of the grant although the company had no contiguous land.

(iii) the easement was one which was intended to be, and was capable of being, used and exercised in connection with the undertaking of the company, and was one which the then owner of the land could validly grant, and was binding upon his successors in title.

[**EDITORIAL NOTE.** Statutory companies often require to lay pipes through, or to erect pylons and carry wires over, long stretches of land. If the rights to do so acquired by agreement are not easements, and therefore capable of being created in perpetuity and binding upon subsequent owners of the lands through or over which such pipes or wires run, the companies are placed in an obvious difficulty, if not in an impossible position. The difficulty can be overcome by the statute giving the company such powers, but this is not always done. This decision is therefore of the greatest importance to statutory companies.

As to Easements in Gross, see HALSBURY, Hailsham Edn., Vol. 11, pp. 265-267, paras. 482-485, and pp. 273-275, paras. 502-504; and for Cases, see DIGEST, Vol. 19, pp. 13-19, Nos. 24-56.]

Cases referred to:

(1) *Todrick* v. *Western National Omnibus Co., Ltd.*, [1934] Ch. 561; Digest Supp.; 103 L.J.Ch. 224; 151 L.T. 163.

(2) *York Corpn.* v. *Leetham (Henry) & Sons, Ltd.*, [1924] 1 Ch. 557; Digest Supp.; 94 L.J.Ch. 159; 131 L.T. 127.

(3) *Attorney-General* v. *Frimley & Farnborough District Water Co.*, [1908] 1 Ch. 727; 43 Digest 1067, ***64***; 77 L.J.Ch. 442; 98 L.T. 905.

SUMMONS to determine whether, upon the true construction of an indenture dated Mar. 23, 1880, made between Marmaduke Charles Salvin and the Weardale and Shildon District Waterworks Co., and upon the true construction of the Weardale and Shildon District Waterworks Acts, 1866, 1875 and 1879, and the Durham County Water Board Act, 1920, and in the events which have happened, the rights, easements, liberties, powers, licences and authorities, granted or purporting to be granted to the Weardale and Shildon District Waterworks Co. are binding upon the plaintiffs in favour of the defendants in respect of the parcel of land situate in the parish of St. Oswald in the county of Durham (being part of the land through which the line of pipes referred to in the indenture runs) of which the plaintiffs are owners in fee simple.

D. Ll. Jenkins, K.C., for the plaintiff.

R. F. Roxburgh, K.C., and *P. J. Sykes* for the defendants.

Jenkins, K.C.: It is difficult to see how the system could be a dominant tenement at all. There is nothing in the deed to prevent water being run through from some totally different reservoir if the board were minded to do it. It cannot be said that the system of pipes in the city of Durham is the dominant tenement to which the right of conveying water was annexed. So far as the deed is concerned, the easement, being an easement in gross, is of a kind unknown to the law. There is nothing in the Acts which can give the right, because, except for a short length, the pipeline is wholly outside the limit of deviation permitted by the Act of 1879, which by sect. 3 incorporated the Waterworks Clauses Act, 1847. If the defendant board has a right to maintain the pipeline, it must rest upon the deed alone. Therefore it is necessary to determine whether what was granted was an easement which binds the land in the hands of the plaintiffs. If the right is in the nature of a A personal licence, the grantee gets only a personal right.

Roxburgh, K.C.: The plaintiffs can only show that they are not bound by the deed by showing that their predecessors in title were not bound. It is said that, as the pipes are not on the line, the works are unauthorised. The landowners are interested in the manner in which the B pipes are laid, and the section relating to deviation is for their protection. But, if they choose to agree to a deviation, there is no reason why they should not be estopped from saying that there has been a deviation. The only thing that is *ultra vires* is the deviation and it can only affect the landowners who have agreed to it. The easement is expressly C granted by reference to the Act. The rentcharge is charged upon the company's undertaking, which is real property. The right granted is to maintain pipes for ever for the purposes of, and subject to the provisions of, the Act. Possibly all such rights must be annexed to the corporeal hereditaments. If so, they qualify under the general law of easements. D They may be statutory or quasi-easements. Parliament can say by an Act that there can be an easement which would not be good under the general law. The right to lay pipes is ancillary to each and every part of the waterworks. Parliament must have contemplated that each and every pipe should be used for each and every authorised purpose. E [Counsel referred to *Att.-Gen.* v. *Frimley and Farnborough District Water Co.* (3).]

Jenkins, K.C., in reply.

FARWELL, J.: The Weardale and Shildon District Waterworks F Co. was a company incorporated by statute in 1866 by an Act entitled:

> An Act for better supplying the Weardale and Shildon district and other places in the county of Durham with water; and for other purposes.

Under that Act, the company was incorporated for the purpose, which is stated in its title, of supplying water to the district in question, and was G given certain powers of acquiring land and other rights and easements compulsorily as provided in the Act. The limits imposed by that Act were extended by a subsequent Act in 1875, and then again those limits were further extended by an Act of 1879. The purpose of both those Acts was to extend the limits within which the company might supply H water and for other purposes referred to therein. By an Act of 1920, called the Durham County Water Board Act, the defendant board became the successors of the Weardale Co. They became the owners of the whole of the property and undertaking of the Weardale Co., and they acquired the benefit of the contracts entered into by that company. In 1880, by an indenture made on Mar. 23, 1880, the Weardale Waterworks Co. acquired certain rights of laying pipes over land of which the owner was then a Mr. Marmaduke Charles Salvin. The present plaintiffs are the successors in title of that person. They are not the immediate successors, but they are the successors, and they now, as owners in fee simple, hold the land which was held by him. By that grant it was witnessed that:

> in consideration of the yearly rentcharge of £3 hereinafter limited and made payable pursuant to the said Acts the said Marmaduke Charles Salvin so far as he lawfully can or may doth hereby grant unto the said company their successors and assigns the free and uninterrupted right easement liberty leave licence power and authority at all times hereafter subject to such restrictions as hereinafter are provided to make and maintain and from time to time to lay relay renew maintain enlarge alter examine regulate cleanse drain and repair all or any mains and pipes necessary or proper for the conveyance or transit of water for the purposes of the said company in and through the land of the said Marmaduke Charles Salvin situate in the township of Elvet in the parish of Saint Oswald in the said county of Durham in the direction and position shown by a red line upon the plan hereupon indorsed and thereupon marked "line of pipes" being part of the lands delineated and described in the plan and section and book of reference thereto deposited with the clerk of the peace for the said county of Durham in reference to the thirdly hereinbefore-mentioned Act with all proper apparatus appendages outlets watercourses works and conveniences connected therewith and all necessary ingress regress and progress from to and along any part of the same lands to and from any other part of such lands provided such mains and pipes be not laid at a less depth than 2 ft. from the surface if so required by the said Marmaduke Charles Salvin his heirs or assigns or his or their tenant or tenants and provided also that all such ingress regress and progress to from and along the same lands in through or over which the several rights easements and privileges are hereinbefore mentioned to be hereby granted shall only be had and enjoyed in and about the making and maintaining and from time to time laying relaying renewing maintaining enlarging altering examining regulating cleansing draining and repairing the said mains or pipes and other works and shall not be used had or enjoyed for any other purpose or project whatsoever to hold exercise use and enjoy the said powers authorities easements and premises hereby granted or intended so to be unto the said company their successors and assigns for ever for the purposes of and subject to the provisions of the said Acts.

Then there is a rentcharge to secure payment of the £3 a year.

The question which has arisen between the parties is whether this grant made by the predecessors in title of the plaintiffs is a grant which is enforceable against and binding upon the plaintiffs, or whether the grant is no longer of any effect, so that, accordingly, the plaintiffs are entitled to make such use of their land as they think fit, without regard to any such right in the defendant company. The plaintiffs have not been the owners of this particular portion of land for very long, and they desire, for their own purposes, to erect buildings on the land, and the position of the pipes on the land may affect their arrangements. Therefore, it becomes most material for them to know whether or not they are bound by this grant made in 1880. The matter is not, in a sense, hostile litigation, because both parties are anxious that the matter should be determined, and, for the purpose of this application to this court, there has been an arrangement made with regard to the costs of it.

The plaintiffs' contention is that this grant is no longer binding upon them, upon two grounds. They say, first, that the acceptance of the grant—that is to say, the acquisition of the right of laying drains given to their predecessors by this grant—was *ultra vires* the Weardale Co.,

and that, therefore, it is wholly ineffective, and never was a grant which
could have been enforced at all. Alternatively, they say that, even
if it was not *ultra vires* for the company to acquire these rights, the only
legal effect of the grant was a personal licence, and that, as soon as the
then owner, the grantor of the grant, ceased to be the owner of the lands,
and the lands passed into other hands, the grant ceased to be one which A
was enforceable by the company at all, and the successors of the grantor
took free and discharged from any such grant at all. On the other hand,
the defendants contend that the grant was, and is, a valid grant, and they
seek to set up an estoppel against the plaintiffs. They say that the plaintiffs' predecessor made this grant, and that he and his successors have been B
paid the rent reserved, £3 a year, every year since then, until the present
plaintiffs became the owners and this dispute arose, and that, as a result
of this grant, the Weardale Co. did not exercise their compulsory powers
under the Act, and that the time within which those powers could be
exercised has long gone past. Therefore, they say, the Weardale Co., by C
the acquisition of the grants have been put into a worse position than that
in which they would have been, and they say that, in those circumstances,
it is not open to the plaintiffs now to set up that this grant is not binding
upon them.

In order to resolve the first question—because, for the moment, I am not D
considering the question of estoppel—it is necessary to look at some of the
sections of the Act of 1879, but, before I do so, I will state quite shortly
the circumstances in which this right came to be acquired. Under the
Act of 1879, the Weardale Co. acquired a right to lay a line of pipes
along a line shown upon the deposited plan. They also had a certain E
limit of deviation, but they were bound, when they exercised their
compulsory powers of laying the line, to do it within the limits prescribed
by the Act. When the pipes were being laid, or some time shortly after
the Act had come into operation, it became necessary to lay pipes through
the land of the person who was the owner of the land, the predecessor F
of the present plaintiffs. For some reason which is not known to me,
and which is not disclosed in the evidence, instead of acquiring the
right to lay, and laying, the pipes through the area which was shown
on the deposited plan for this particular portion of the line of pipes,
the line was diverted, and carried up and along through the plaintiffs' G
predecessor's property, by virtue of the grant to which I have just
referred, but not in the line shown on the deposited plans, nor within
the permitted deviation. Why that was done, as I say, does not appear,
but it was done as a result of a grant which the company obtained from
the plaintiffs' predecessor, and the pipes were carried along that line H
and brought down again and joined on to the line shown on the deposited
plan, and so carried on until the work was completed. Those were the
circumstances in which that grant was obtained.

The Act of 1879 recites the incorporation of the Weardale and Shildon
District Waterworks Co.—I need not refer to the recitals—and in sect. 5

of the Act the company is granted an extension of the limits for supply of water, and those limits are stated. Then by sect. 10 there is a provision that:

> Subject to the provisions of this Act the company may do the following acts and things: (that is to say) they may, in the lines and situations and on the lands shown on the deposited plans and according to the levels shown on the deposited sections, continue and maintain, in the parish of St. Oswald, in the county of Durham, all or any of the works of the Durham Co. shown on the deposited plans, and works incidental thereto, amongst which are comprised the following: namely, line of pipes (No. 1). A line of pipes situate in the township of Elvet, commencing at the said Mountjoy service reservoir and terminating in Hallgarth Street in the city of Durham: 3. Line of pipes (No. 2). A line of pipes situate in the township of Elvet, commencing at the said Mountjoy service reservoir and also terminating in Hallgarth Street in the city of Durham.

There are other provisions in that section to which I need not refer, but the section continues:

> together with all proper approaches, communications, filter-beds, works, and conveniences ancillary or subsidiary thereto or connected therewith, and subject to the provisions and for the purposes of this Act, may purchase, enter upon, take, and use such of the lands described in the deposited plans and book of reference, and any easement, right, or privilege in or over the same, as they may require, or as have already been conveyed or agreed to be conveyed to the company, and may take, use, and appropriate for the purposes of works authorised by this Act and of the existing and authorised works of the company all waters found in, on, or under any of the said lands so purchased, and other the lands for the time being belonging to the company, and may divert, widen, or narrow such turnpike roads and public carriage-roads, or any of them, as are marked upon the deposited plans as intended to be diverted, widened, or narrowed, and may stop up all such roads and ways within the limits of deviation defined on the deposited plans as would interfere with the construction and use of the works by this Act authorised, and may appropriate for the purposes of this Act the sites of the roads and ways so diverted and stopped up.

Then there is a section dealing with the particular lines in connection with the North Eastern Railway Co., to which I need not refer. Sect. 12 provides for a limit of deviation outside the line of pipes shown on the deposited plans, and it defines that limit. Sect. 14 provides:

> The powers granted to the company by the Act of 1875 for the compulsory purchase of lands, so far as regards any lands of the Redford Grove Estate required for the purposes of the intended Redford reservoir and the lines of pipes No. 7, No. 8, and No. 9 mentioned in sect. 16 (A) of that Act, are hereby revived, and may, notwithstanding anything in the Act of 1875, be exercised at any time within five years from the passing of this Act.

Sect. 15 provides:

> The respective periods limited by sect. 16 of the Act of 1875 for the compulsory purchase of lands for the purposes of that Act (other than the lands mentioned in the last preceding section of this Act) shall be and the same are hereby extended.

Then there is an extension of the time. In sect. 20 there is a provision that:

> The powers of the company for the compulsory purchase of lands for the purposes of the works authorised by this Act shall not be exercised after the expiration of four years from the passing of this Act.

Thus, for the purpose of acquiring the rights and land which the company require to carry out the extended work, those rights had to be exercised within four years after the passing of the Act. Then sect. 22, which is important in this case, provides:

> The company, in addition to any lands which they are now authorised to hold or

> acquire, may from time to time, for the purposes of their undertaking, purchase by agreement, in addition to lands which they are by this Act authorised to take by compulsion, any lands not exceeding in the whole 25 acres.

Sect. 23 is also an important section :

> The company may from time to time, subject to the provisions and for any purpose of this Act or the Acts of 1866 and 1875, take by agreement, and any person by the Lands Clauses Consolidation Act, 1845, or otherwise enabled to convey or release lands may grant to the company, any easement, right, or privilege of laying and maintaining water pipes and mains in or through any lands within the company's limits of supply as extended by this Act, at a yearly rent or otherwise ; but in case of a person not enabled otherwise than by the Lands Clauses Consolidation Act, 1845, to sell lands, then subject and according to the provisions relating to the taking of lands by agreement contained in that Act.

In considering how far the acquisition of the right in this case was within the powers of the company, it is not irrelevant to remember that the acquisition of rights of an easement, such as an easement to lay drains in the land of another, is in no sense unlawful so long as the consent of the owner of the lands can be acquired, and the acquisition of such rights is not a matter which by itself would require the assistance of Parliament. When, however, it becomes a question of laying down a long line of pipes and acquiring land for the purpose of making reservoirs and the like, it is obvious that it would be impossible to rely upon the acquisition of the necessary rights by mere agreement. Therefore it is necessary for a company of this kind to obtain power to acquire such rights or such land by compulsion. That power can only be granted by Parliament, and, therefore, when a company of this kind desire to acquire such compulsory rights of purchase, it is necessary to obtain an Act of Parliament to give them that right, and, of course, when Parliament grants that right to a company, it imposes upon that company the limits and conditions and terms subject to which such powers are to be exercised.

Accordingly, for the protection of the person who owns adjoining land, it is necessary for the company, when they seek such powers, to show upon the deposited plans the line of the proposed site, and it is necessary, again for the protection of the adjoining landowner, that the limits within which the company may deviate from that line, which is shown on the deposited plan, should be carefully defined. Again, in the same way and for the same reason, it is necessary that such powers should be granted to the company, for a limited time only, and not at any time which the company may choose to exercise them. All those terms and conditions are conditions imposed—primarily, at any rate—for the protection of the adjoining landowner, and it is only on such terms and conditions that such powers are granted. The Act which gives the company such powers, and requires such conditions to be observed, does not, however, take away from the company the right to acquire at any time and without any limit an easement or lands by mutual agreement with the owners of the land. The only limit is that the acquisition of such land or right must be strictly necessary or proper for the main purpose for which the company was incorporated—namely, the collection, storage and supply of water in the district which is defined by the Act.

It follows from that that, in my judgment, supposing that in this case
the company had laid its line of pipes along the line as shown in the
deposited plans, having acquired by compulsion or otherwise the right
so to lay those pipes, and that, when the work was completed, it had been
found desirable or necessary, for the proper carrying out of the object,
A to lay some additional line of pipes outside any limit of deviation or
otherwise shown on the deposited plans, there would be no doubt that
the company would have had, and had, ample power to secure such rights.
The only ground upon which such an acquisition could be challenged
would be on the ground that it was not proper or necessary for the
B general purposes of the company. Subject to that, it could not be
suggested, I think, that such an acquisition was *ultra vires* the company.
That, of course, is not exactly this case, because it is not a case of merely
acquiring the right to lay pipes, but the purpose of the acquisition of
the rights by agreement was to enable the pipes to be laid otherwise
C than on the line shown by the deposited plan, and within the limits of
deviation. The question is whether or not that makes this grant one
which the company could not properly take. In my judgment, as I
have already indicated, the rights to acquire easements or land by
compulsion are strictly limited to a particular area, just as the rights
D are strictly limited as to time. However, there is, in my judgment,
nothing *ultra vires* the company, if they can acquire by agreement the
right to lay pipes outside the limits of deviation, in acquiring that
right and in so laying their pipes. The moment that they endeavoured
to acquire such a right to lay such pipes compulsorily, of course they
E would be acting *ultra vires*, but, so long as the consent of the owner
which enables them to lay their pipes is obtained by agreement, and not
by compulsion, in my judgment, it does not make it *ultra vires* of the
company to secure such rights and to lay the pipes in that land. As
I have said, there is no evidence before me to indicate why this particular
F course was adopted—that is to say, why, instead of acquiring compulsorily
the right to lay the pipes along the line shown on the deposited
plans across the property of the predecessor in title of the plaintiffs,
they made this agreement with him whereby they acquired voluntarily
the right to lay the pipes, and laid them outside the limits of deviation.
G It may be that the reason was that it was at the request of, and for the
advantage of, the then owner, or it may be that it was found to be the
best and most convenient way of laying the pipes to carry out the main
purpose of the company. However that may be, there is no evidence
before me as to the reason for this particular transaction, but, in my
H judgment, I am entitled, in the absence of any evidence to the contrary
for the plaintiffs, to proceed on the footing that the acquisition of the
rights and the laying of pipes in this way was a good and proper reason
for carrying out the objects of the company in this way. I feel considerable
doubt, although I am not putting it on that ground, whether
the plaintiffs, as the successors in title of the grantor, can be heard to

say that there was not a good and sufficient reason for the company doing what they did. In my judgment, the presumption is that the company were acting properly, and, in the absence of any evidence to the contrary, it appears to me that I am entitled to assume that there was a good and satisfactory reason for adopting this course. If that be so, it follows that, in my judgment, the acquisition of this particular A right of laying drains in this particular piece of land was not *ultra vires* the company, and, so far as the first contention made on behalf of the plaintiffs is concerned, it is one which I cannot accept.

The second ground on which the plaintiffs put their case is this. They say that, at the most, this grant can have been only a grant of a personal B licence. It is, they say, an attempt to create an easement in gross, and—and as to this there is no possible doubt—an easement in gross is a right unknown to our law. That being so, it may have had the effect that the licence which was granted by the grantor may not have been binding upon him, but, at any rate, it could not have been binding C on any successor of his. As I say, if this be in fact an easement in gross, it follows that it cannot be now binding upon the plaintiffs, and the question that I have to determine is whether or not it is an easement in gross. It is said that it is an easement in gross, because it is said—and said quite truly—that, in order to create a valid easement, there D must be a dominant and servient tenement, and it is said that here there is no dominant tenement. In my judgment, that is not sound. The undertaking in this case, which is now vested in the defendants, consists of corporeal hereditaments and incorporeal hereditaments, the corporeal hereditaments being the lands which the company acquired E for the purpose of its object—that is to say, lands for the erection of reservoirs and other similar purposes—and the incorporeal hereditaments being the rights which it acquired in land of others, to lay pipes and for other purposes. The undertaking, in my judgment, being composed of corporeal and incorporeal hereditaments, is capable of being the F dominant tenement in respect of such a grant as this. It is plain that the dominant tenement need not be contiguous to the servient tenement. Even in the case of an easement of way, a right of way, it has now been decided by the Court of Appeal that there is no necessity that there should be contiguity. That decision is to be found in the case of *Todrick* G v. *Western National Omnibus Co., Ltd.* (1), and I may say that it is a decision of the Court of Appeal reversing a decision of mine in which I held that physical contiguity was necessary. I need only read two lines of the headnote:

> A right of way can validly be made appurtenant to land with which the way H has no physical contiguity, but it must be beneficial in respect of the occupation of that land.

The limit is, therefore, that it must be a right which is capable of being, and intended to be, used in connection with the dominant tenement.

In the present case, in my judgment, it is plain that this easement was one which was intended to be, and was capable of being, used and exercised in connection with the undertaking of the Weardale Co., and, if that be so, it must follow, in my judgment, that this was an easement which is capable of being created, not an easement in gross, and one which the then owner of the property could validly grant, A and, having validly granted it, as he did, it is a grant which is binding upon the other persons on to whose land the property comes. That is to say, the persons who acquired the property acquired it subject to the grant which had been made in 1880 of this particular easement to the Weardale Co. The defendants, being the persons entitled to the B benefit of such grant, are now the persons who are entitled to enforce it, and entitled to enforce it against the present plaintiffs, the present owners of the property.

For those reasons, I have come to the conclusion that the grant is one which is enforceable against the plaintiffs, and it is unnecessary for C me to consider what I think may be a question of some little difficulty, as to how far a company is entitled to claim that a person in the position of the defendants is estopped from saying that some act or thing done by the company was *ultra vires* the company. The question is one which was discussed and considered in *York Corporation* v. *Leetham* D *(Henry) & Sons, Ltd.* (2), a decision of RUSSELL, J. It is quite plain from that decision, and from later decisions, that the question is one of some difficulty, but I need not consider it further, because, as I say, I have come to the conclusion, on the grounds which I have stated, that this grant was a valid grant, and is now binding on the plaintiffs. E I propose, therefore, to make a declaration to that effect, and it is unnecessary for me to make any order with regard to costs.

Declaration that the licences, powers and authorities granted by the said indenture to the Weardale and Shildon District Waterworks Co. are binding upon the plaintiffs in favour of the defendants in respect of the parcel of F *land in question.*

Solicitors: *Blundell, Baker & Co.*, agents for *Ritson, Hope & Wood*, Sunderland (for the plaintiffs); *Howe & Rake*, agents for *Lucas, Hutchinson & Meek*, Darlington (for the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

G

CLAPMAN *v.* EDWARDS.

[CHANCERY DIVISION (Bennett, J.), **March 31, April 1, 1938.]**

H *Landlord and Tenant—Right to advertise on walls—Flank walls of property not part of the property demised—Easement or licence—Whether right of advertising restricted to business carried on on the demised premises.*

The defendant was the underlessee of premises used as a petrol-filling station, and included in the parcels of the lease was the right to use the flank walls of the adjoining premises for advertising purposes. He granted to Odhams Press, Ltd., the owners of a business called the Borough Billposting Co., the right to advertise on the flank walls.

The plaintiff, the successor in title to the underlessor, sought an injunction to restrain the defendant from permitting any person other than himself to use the flank walls for advertising purposes, on the grounds that the right to advertise was not assignable, or, alternatively, was not assignable apart from the land upon which the petrol station was situated, and also that there was an implied term that the walls would be used only for advertisements connected with the business of the petrol-filling station :—

Held : (i) the underlease contained nothing restricting the legal right of the defendant to deal freely with the subjects of the grant and he could advertise anything he chose upon the flanks in question.

(ii) there being no restriction upon the right to advertise, the right was not an easement, as there was no connection as to user between the dominant and the servient tenements.

[**EDITORIAL NOTE.** The precise effect of the grant of a right to advertise upon a wall is often the subject of contention between the various parties interested, and, although the precise position in law is a matter of the construction of the particular words used in the grant, this case will be of considerable importance in determining the general legal position. In cases where the wall is not part of the premises of the advertiser, it would seem that the grant will not in ordinary cases amount to an easement, but to a licence, the assignability and revocability of which must be determined by construing the terms of the grant.

As to Licences, see HALSBURY, Hailsham Edn., Vol. 20, pp. 8-12, paras. 5, 6 ; and for Cases, see DIGEST, Vol. 30, pp. 500-522, Nos. 1584-1766.]

Cases referred to :

(1) *Frank Warr & Co., Ltd.* v. *London County Council*, [1904] 1 K.B. 713 ; 30 Digest 509, *1650* ; 73 L.J.K.B. 362 ; 90 L.T. 368.

(2) *Muskett* v. *Hill* (1839), 5 Bing. N.C. 694 ; 30 Digest 515, *1709* ; 9 L.J.C.P. 201.

(3) *A.-G.* v. *Horner* (*No. 2*), [1913] 2 Ch. 140 ; 26 Digest 304, *356* ; 82 L.J.Ch. 339 ; 108 L.T. 609.

(4) *Harris* v. *Chesterfield* (*Earl*), [1911] A.C. 623 ; 19 Digest 207, *1577* ; 80 L.J.Ch. 626 ; 105 L.T. 453 ; *affg.* S.C., [1908] 2 Ch. 397.

(5) *Taite* v. *Gosling* (1879), 11 Ch.D. 273 ; 31 Digest 154, *2885* ; 48 L.J.Ch. 397 ; 40 L.T. 251.

(6) *Bower* v. *Hodges* (1853), 13 C.B. 765 ; 36 Digest 683, *1620* ; 22 L.J.C.P. 194.

(7) *Ackroyd* v. *Smith* (1850), 10 C.B. 164 ; 19 Digest 12, *20* ; 19 L.J.C.P. 315 ; 15 L.T.O.S. 395.

(8) *National Carbonising Co., Ltd.* v. *British Coal Distillation, Ltd.*, [1936] 2 All E.R. 1012 ; Digest Supp.

(9) *King* v. *David Allen & Sons, Billposting, Ltd.*, [1916] 2 A.C. 54 ; 30 Digest 514, *1700* ; 85 L.J.P.C. 229 ; 114 L.T. 762.

(10) *Mitcalfe* v. *Westaway* (1864), 17 C.B.N.S. 658 ; 31 Digest 34, *1811* ; 34 L.J.C.P. 113 ; 11 L.T. 673.

Action for an injunction to restrain the defendant, the underlessee of a petrol-filling station at No. 111, Catford Hill, Lewisham, in the county of London, until he had assigned or divested his interest in the term of years, from permitting any other person, firm or corporation from using the flank walls of the premises for advertising purposes. The plaintiff also asked for a declaration that the right to use the flank walls for advertising purposes was not assignable nor transferable apart from the premises.

H. Wynn Parry, K.C., and *Bernard Lewis* for the plaintiff.

R. F. Roxburgh, K.C., and *C. Montgomery White* for the defendant.

Parry, K.C.: There is a distinction between the successors in title of, and the parties deriving title under, the parties named: see the Law of Property Act, 1925, ss. 78, 79. In the present case, the phrase in the document relates only to a person who takes over the whole of the rights of one of the parties; it does not relate to a person who acquires one only of those rights. Anyone who fulfilled the description of successor in title to the defendant would take over the whole of his rights under the document. Otherwise he would be a person who only derived title under him. The corporeal and incorporeal property were intended to be enjoyed together. Even if the grant could be construed as the grant of a licence and not of an easement, the licence could not be assigned by the defendant separately from the term in the demised premises. A licence is only a form of contract, and *prima facie* a licence is not assignable. The only indication of a right to assign is to be found in the expression "successors in title." An easement cannot be severed. A licence is personal, and, if the plaintiff were to assign her reversionary interest in the premises, the assignee would not be bound by the licence. [Counsel referred to *Frank Warr & Co., Ltd.* v. *London County Council* (1) and *Muskett* v. *Hill* (2).]

Roxburgh, K.C.: The parties were trying to demise the premises for 99 years, less one day. It is therefore plain that the parties were trying to create some right which was assignable. The effect of the grant of the right to advertise on the flank walls was to grant a licence. One cannot annex to property a right which is neither a *profit à prendre* nor an easement. A proprietary right must necessarily bind everybody into whose hands the property may come, whereas a contractual right does not. First of all, is the licence assignable? Secondly, is there any limitation upon the right to assign? The use of such words as "successors in title" is not intended to be a restriction upon the right to assign, but an indication that such a right exists. The term is not a fetter upon assignability. Notwithstanding the use of the words "successors in title," the premises can be underlet. If no limitation is implied as regards the corporeal premises, no limitation upon the assignability of the licence should be implied. Nobody could intend a contract for 99 years to be non-transferable. [Counsel referred to *A.-G.* v. *Horner* (*No. 2*) (3), *Harris* v. *Chesterfield* (*Earl*) (4), *Taite* v. *Gosling* (5), *Bower* v. *Hodges* (6) and *Ackroyd* v. *Smith* (7).]

White: The statement that a licence is not assignable is one that cannot stand, in view of the decision in *National Carbonising Co., Ltd.* v. *British Coal Distillation, Ltd.* (8). The use of the word "assigns" does not limit the rights of the lessee. It must be assumed against the grantor that his grant was intended to be as beneficial as possible to the grantee. [Counsel also referred to *King* v. *David Allen & Sons, Billposting, Ltd.* (9) and *Mitcalfe* v. *Westaway* (10).]

Parry, K.C., in reply: The condition is satisfied if it appears that a benefit will result to the dominant tenement by having a right over the servient tenement. It cannot be denied that the right to advertise the goods of the defendant is all that is necessary to make it follow that there will be an advantage to the dominant tenement. If there is a licence, the grant of the corporeal property and the grant of the incorporeal property are so linked together that they cannot be dealt with separately.

Bennett, J.: In this action, the present dispute between a landlady, the wife of David Clapman, and her tenant, raises a question as to the rights under an underlease dated Oct. 23, 1935, granted by the plaintiff's predecessor in title, Mr. Miller. The underlease is between Mr. Miller, who is called the lessor—which expression, so the document says, is to include, where the context admits, his successor in title—of the one part, and the defendant, who is thereinafter called the lessee—which expression shall, where the context so admits, include his successors in title—of the other part. Clause 1 provides:

> In consideration of the sum of £1,200 now paid by the lessee to the lessor the receipt whereof is hereby acknowledged and of the rent hereinafter reserved and the covenants by the lessee hereinafter contained the lessor hereby demises unto the lessee all that piece or parcel of land situate in the parish of Lewisham in the county of London and fronting on a road or roads there called Creeland Grove and Catford Hill Catford aforesaid together with the petrol station erected thereon or on some part thereof which piece or parcel of land and premises are known as No. 111 Catford Hill aforesaid and are for the purpose of identification more particularly delineated and described in the plan drawn hereon and thereon coloured pink and together also with the right to use the flank walls of the adjoining premises marked A and B on the plan hereto annexed for advertising purposes except and reserved unto the lessor the right to use the drains or sewers in or under the said land for the purpose of draining the adjoining properties of the lessor and the right to enter upon the demised premises when necessary for the purpose of inspecting and cleansing the interceptor chamber and the drains or sewers running from such adjoining properties the lessor making good any damage caused by or in consequence of such entry to hold unto the lessee for the term of 99 years (less one day) from Sept. 29, 1934, yielding and paying therefor the yearly rent of £20 by equal quarterly payments on the usual quarter days.

Clause 2 (4), which contains the lessee's covenants, has this covenant on behalf of the lessee:

> And also will from time to time and at all times during the said term well and substantially repair uphold support sustain maintain glaze cleanse amend and keep in good and substantial repair the said premises hereby demised and every part thereof including any damage to the said flank walls of the adjoining premises caused by the lessee by reason of the user thereof for advertising purposes with the appurtenances and all other the buildings which now are or which at any time hereafter may be erected upon the piece of land hereby demised or any part thereof with all necessary reparation cleansings and amendments whatsoever as need shall require.

Then para. (9) of the same clause provides that the lessee is:

> not at any time during the said term without the previous consent in writing of the lessor and the superior landlord to carry on or permit to be carried on upon the premises the trade or business of a hairdresser butcher motor engineer or maker of or dealer in wireless accessories or any noisy noisome or offensive trade or business whatsoever but this clause shall not be construed in such a way as to prevent the demised premises from being used for the purpose of a petrol and motor filling station.

Then by para. (10) of the same clause it is provided:

> and also will within 30 days next after the execution of any assignment or under-

> lease for a term exceeding 21 years (except an assignment or underlease by way of mortgage but including an assignment of a mortgage term on sale) give notice in writing of and produce such assignment or underlease to the lessor or his solicitor.

The petrol station demised by the underlease is bounded on the south-east by six blocks of flats, on the north-west of which is wall A., and on the south-west by four blocks of eight flats, of which the north-east wall was the wall marked B. on the said plan. On Oct. 23, 1935, the same day as the day upon which the underlease was granted, the reversion of the underlease and the land comprising the adjoining premises on which the two flank walls stood were transferred by the underlessor, Mr. Miller, to the plaintiff. On Dec. 12, 1935, the defendant, Mr. Edwards, entered into an agreement with Odhams Press, Ltd., the owners of a business called the Borough Billposting Co. The agreement was in writing, and in it Mr. Edwards, the defendant, is described as the lessor and the Borough Billposting Co. are described as the lessees. By that agreement it was mutually agreed that the lessor should grant and the lessees should take the exclusive right of posting, painting or affixing and maintaining advertisements either by enamel plates, boards, signs, posters or hoardings upon the walls of the lessor situate and known as No. 111, Catford Hill, S.E.6, the walls being the two flank walls referred to in the underlease. The agreement was to remain in force for the term of one year from the date of the completion of the erection of the hoardings and/or advertisements, and the lessees were to pay to the lessor the yearly sum of £84, plus rates, payable quarterly on the usual quarter days, for the use of the said advertising position during the continuance of the agreement. The claim of the plaintiff as set forth in the statement of claim is that, upon the true construction of the underlease, the right to use the flank walls for advertising purposes is not a right assignable or transferable by the defendant, or, alternatively, that the right to use the flank walls for advertising purposes is not a right assignable or transferable by the defendant separately or apart from the physical property comprised in the underlease—namely, the land upon which the petrol-filling station was erected. There was a further submission in the statement of claim, which is that, upon the true construction of the underlease, the right to use the flank walls for advertising is a right to use the said flank walls for advertisements connected with, and relating to, the business carried on upon the said premises, and not otherwise. The claim has been put forward at various times in various ways. It was first of all argued that, upon the true construction of the underlease, what had been demised by the underlease to the defendant was an easement of the petrol station, No. 111, Catford Hill, as a dominant tenement, and the flank walls referred to in the underlease as the servient tenement. It was upon the footing that that was the true legal effect of the underlease that the argument rested, first of all, that the right to advertise was incapable of being separated from No. 111, Catford Hill, and, secondly, that the advertisements must be restricted to advertisements relating to the business carried on upon the dominant tenement, No. 111, Catford Hill. The argument was first of all put forward, upon the language of cl. 1 of the underlease, to the effect that it would be found from the language used that all those characteristics were competent and intending to create or grant a lease. From that, it was said that one must hold that the right granted to the defendants is an easement, and, if it be an easement, it must in future be restricted to the requirements of the dominant tenement, No. 111, Catford Hill, and therefore one cannot exercise the right of advertising so as to advertise goods which are not connected with the business carried on upon the dominant tenement. It was not long, I think, before the plaintiff was driven from that argument because of the language which is to be found in the underlease. It must be construed strictly against the grantor, the underlessor, Mr. Miller, to whose rights the plaintiff has now succeeded. There is no limitation in words of the purpose for which the right to advertise on the flank walls is granted. The words are:

> to use the flank walls of the adjoining premises marked A. and B. on the plan hereto annexed for advertising purposes.

I can see no reason why I should imply into the lease words restricting the right of the defendant to advertising only his own business, or something connected with his own business, upon the flank walls in question. Once that interpretation or construction is put upon the first clause of the lease, it becomes impossible to hold as a matter of law that that which Mr. Miller granted to the defendant was an easement, because that cannot be an easement which is not related to, or granted in respect of, the dominant tenement, the user of which is not limited by the requirements of the dominant tenement. If it were to enable the grantee, as I hold it does, to advertise anything he chooses upon the flank walls in question, there is no connection between the dominant tenement and the servient tenement in the flank walls in respect to such a user.

The first ground upon which the plaintiff rested her case is one for which there is no foundation. The next ground was that, upon the true construction of the agreement as a whole, the contract made between the parties was that the right to use the flank walls for advertising purposes was permanently married, to use Mr. Wynn Parry's phrase, to the land the subject of the demise, and never could be separated from it. The right to advertise and the land were indissolubly linked together during the whole currency of the term of 99 years. First of all, having arrived at the conclusion that what was granted by the underlease was not an easement, the question is, what was it from the point of view of the law? There was no letting of the flank walls adjoining the land comprised in the underlease. It is clear that what was granted by the plaintiff's predecessor to the defendant was a licence to advertise on these walls for 99 years, less one day, from Sept. 29, 1934. The argument that the licence and the property, the land, were indissolubly tied together was rested on two grounds, the first and main ground being the language and the form of cl. 1 of the lease. It is said that in that clause one finds one verb—the verb " demised "—used for the purpose of passing from the underlessor, Mr. Miller, to the defendant the rights which the defendant was to have, and that " shall be demised " was followed, first of all, by a description of the land together with the petrol station and together also with the right to use the flank walls. That form of passing to the defendant the interest he was to have suggests, it was argued, the idea of the inseparability of the three subjects which are being transferred. The fact that before one comes to the habendum that phraseology is followed by an exception, and then the exception is followed by one habendum which in its terms is followed by one covenant to pay rent, together show that the parties must have intended inseparability of the three subjects passed by the deed to the defendant. The argument for that construction is supported by the description of the defendant—namely, the provision that the word lessee, where the context so admits, includes his successors in title, the argument being that those words " his successors in title " mean some person who takes everything comprised in and demised by the original underlease. I think that I have fairly stated the argument of the plaintiff in its final form. When one comes to consider it, in my judgment it leads to no such conclusion as that for which the plaintiff contends. Before she can succeed in restricting the defendant in making the most beneficial use he can of the property granted to him by the underlease, it is for her to make it clear that she has imposed some fetter upon the freedom which the law allows of dealing with the property and the rights which were granted to him by the instrument under which he holds them. There is nothing in the language of this instrument, in my judgment, which makes it plain (it should be reasonably made plain if the parties intended to do it) that the defendant was not to have the right which the law gives him of dealing freely with the subjects of the grant. For these reasons, in my judgment, there is no foundation for the relief which the plaintiff seeks, and her action fails, and must be dismissed with costs.

Action dismissed with costs.

Solicitors : *E. H. Silverstone & Co.* (for the plaintiff) ; *Harold Kenwright & Cox* (for the defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*

HOUSE PROPERTY & INVESTMENT TRUST, LTD. *v.* KNEEN (INSPECTOR OF TAXES).

[King's Bench Division (Lawrence, J.), **March 25, 28, April 12, 1938.]**

Income Tax—Assessment of property under Schedule A—Rent—Additional sum, being insurance premium, made payable as rent—Income Tax Act, 1918 (*c.* 40), *Sched. A, No. IV, r.* 10 (*a*) (*b*).

The lease of a house provided for the payment by way of further rent of an additional sum equal to the amount of the insurance premium paid by the lessor. The landlords contended that the gross assessment under Sched. A should be determined by reference to the rent exclusive of the payment in respect of the insurance premium :—

Held : the payment in respect of the insurance premium should be taken into account in determining the gross assessment under Sched. A.

[EDITORIAL NOTE. The rent reserved by a lease or agreement is *prima facie* the measure of the annual value, but this assumes that the incidence of such additional charges as rates, taxes and insurance is left to follow its normal course. Where there are special provisions in respect of these incidents which make them payable by the party who would not pay them in the ordinary way, such alteration in the incidence of these charges must be taken into account in fixing the annual value.

As to Annual Value, see HALSBURY, Hailsham Edn., Vol. 17, pp. 39, 40, para. 70 ; and for Cases, see DIGEST, Vol. 28, pp. 7, 8, Nos. 17-27.]

Case referred to :

(1) *Turner* v. *Carlton*, [1909] 1 K.B. 932 ; 28 Digest 7, *25* ; 78 L.J.K.B. 378 ; 100 L.T. 400 ; 5 Tax Cas. 395.

Case Stated under the Income Tax Act, 1918, s. 149, by the commissioners for the general purposes of the income tax for the opinion of the King's Bench Division of the High Court of Justice.

A house was let for a period of 14 years with the following provision as to rent. For the first 5 years the rent was to be £100 per annum, for the sixth and seventh years £125 per annum, and for the remainder of the term £150 per annum. In each case there was added by way of further rent a yearly sum equal to the amount of the insurance premium paid by the lessor, which was approximately £1 per annum. By an indorsement made in 1936 the rent of £150 per annum was reduced to £104 per annum. It was contended by the appellants, the present landlords of the property, that the gross assessment under Sched. A should be determined by reference to the rent only, and without addition of the insurance premium. It was contended that such premium was not one of the rates, taxes or other duties referred to in the Income Tax, 1918, Sched. A, No. IV, r. 10 (*b*). The commissioners determined that the insurance premium must be taken into consideration in arriving at the annual value.

The Income Tax Act, 1918, Sched. A, No. IV, r. 10 (*a*), (*b*), provides as follows :

> In making any such assessment regard shall be had to (*a*) any increase of the amount of the rent reserved by reason of any agreement by the landlord to discharge the tenant's rates, taxes, assessments, or duties hereinbefore mentioned ; (*b*) any decrease in the amount of the rent by reason of any agreement by the tenant to discharge those of the landlord . . .

J. S. Scrimgeour for the appellants.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: In this case, the commissioners have decided that the annual value of the appellants' premises for the purposes of Sched. A
A is the amount of the rent, notwithstanding that the rent includes a sum representing the premium for the insurance of the premises. The appellants contend that insurance is a matter which is altogether extraneous to annual value, that the annual value is the same, no matter whether or not the premises are insured, or by whom they are insured,
B and that here the sum payable as further rent on account of the premium of insurance should have been excluded from the annual value.

For the Crown, it is contended, in the first place, that the lease in question provided for a rent of £104 per annum and a further rent of £1 per annum for insurance, and that the lease is the best evidence under
C Sched. A, No. 1, r. 2, of the rack rent at which the premises are worth to be let, and, secondly, that, if a premium of insurance is excluded from the annual value, where the lessee has agreed, as here, to pay the premium, the lessor will pay tax on the annual value, excluding the premium, and will also get a deduction on account of insurance under Sched. A,
D No. V, rr. 7, 8. The Solicitor-General also relied upon the expression of opinion of CHANNELL, J., in *Turner* v. *Carlton* (1).

In my opinion, the Crown are right on both points. The particular lease in question refers to the premium of insurance as a further rent, and the commissioners were entitled to treat it as evidence of the rack
E rent within Sched. A, No. 1, r. 2. Apart from this consideration, however, the repairs allowance provided for by Sched. A, No. V, r. 7, must, I think, be taken to include insurance, since r. 8 deals expressly with insurance, and there can be no reason for allowing a claim under r. 8 unless r. 7 deals with the same subject-matter. It follows that the statute
F contemplates that the lessor is entitled to deduct from the gross annual value a sum in respect of insurance, and, if this is so, it cannot be that that annual value is not to include provision for insurance. The statute must, I think, be framed upon the view that rack rent is the full rent payable where the landlord bears a landlord's expense of maintenance,
G management, repairs, and insurance, from which rack rent the landlord is entitled to the deductions provided for by Sched. A, No. V, rr. 7, 8, or, if they are to be borne by the tenant, regard may be had thereto under Sched. A, No. IV, r. 10 (*c*), in arriving at the annual value. I am, therefore, of opinion that the decision of the commissioners was correct,
H and the appeal will be dismissed, with costs.

Appeal dismissed with costs.

Solicitors: *Henry Gover & Son* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

R. *v.* MUIR.

[Court of Criminal Appeal (Lord Hewart, L.C.J., Humphreys and Macnaghten, JJ.), **April 11, 1938.]**

Criminal Law—Dissimilar offences charged in one indictment—Whether prejudicial to accused.—Separate trials.

The appellant was convicted upon an indictment which charged four offences, two of rape on a young girl on two different occasions, a third with stealing 12*s.* 6*d.* from the girl's father, and a fourth of indecent assault on a totally different person, a married woman. He appealed on the ground that the two charges of rape and the one of indecent assault should not have been tried together :—

Held : these two dissimilar offences should not have been charged in one indictment, and, if so charged, should not have been tried together.

[EDITORIAL NOTE. Generally speaking, several offences may be joined in one indictment and may be tried together. Separate offences cannot, however, be alleged in the same count of the indictment. In practice, however, where the offences are distinct and require to be supported by different evidence, they are better made the subject of separate indictments. If they are included as separate counts in one indictment, then they should be separately tried.

As to Joinder of Offences, see HALSBURY, Hailsham Edn., Vol. 9, pp. 137, 138, paras. 179, 180 ; and for Cases, see DIGEST, Vol. 14, pp. 226-231, Nos. 2111-2174.]

Appeal by leave from a conviction and sentence at the Manchester Assizes upon the ground that the indictment charged two dissimilar offences, which were tried together.

No counsel were instructed in this appeal.

Humphreys, J. [delivering the judgment of the court] : This man, William Muir, was convicted at the Manchester Assizes upon an indictment of a somewhat curious nature. The indictment charges two offences of rape—that is to say, charges of rape on a young girl on two different occasions. Then a third count charges him with stealing 12*s.* 6*d.* from William MacTaggart, who was in fact the father of the girl alleged to have been raped. The fourth count charges indecent assault on a totally different person, a married woman. The appellant was convicted, and he applies for leave to appeal against that conviction, and also against sentence. His sentence was one of 5 years' penal servitude with regard to the two charges of rape, and sentences of 6 months' imprisonment upon the other two charges. Those sentences were ordered to run concurrently with the sentence of penal servitude.

The only question which arises on this appeal is whether this court ought to take any action as the result of the two charges of rape and indecent assault having been tried together, which, in the opinion of this court, would very much better have been separately tried. There cannot be any doubt that, when a man is charged with rape, it is prejudicial to him to have before the jury a charge of indecent assault on another person at a different time. The second charge was different in character, and quite unconnected with the charge of rape, and could

not have been given in evidence on a charge of rape. On the whole, we are satisfied that no miscarriage of justice has occurred, and have come to the conclusion that we cannot interfere with this conviction. This court thinks it right, however, to say that, for the assistance of those who have to draw indictments on assize, it is undesirable that
A these two dissimilar offences should be charged in one indictment. There can be no doubt that, if this appellant had been represented by counsel, he would have applied that the fourth count should be tried separately, and it might well be that the judge would have acceded to that application. The appellant, however, being unrepresented by counsel, did in fact
B object to the fourth count, but that was under a misapprehension. He said that he was not arraigned in the lower court according to the indictment then being tried.

Appeal dismissed.

Solicitor: *Registrar of the Court of Criminal Appeal.*

C

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

MILLER *v.* AMALGAMATED ENGINEERING UNION.

D

[CHANCERY DIVISION (Morton, J.), **April 26, 27, 1938.**]

Trade Unions—Agreements—Enforceability—Superannuation benefit—Union illegal at common law—Trade Union Act, 1871 (*c.* 31), *s.* 4.

M. was at all material times until his death a fully-qualified member of the defendant union, which was duly registered under the Trade
E Union Acts, 1871-1927. From 1931 until his death in 1936, M. was a patient in a hospital, and it was alleged that the superannuation benefit due to him apart from that in respect of the period between June and Oct., 1931, had not been paid to M., and it was claimed in this action by the administrator with the will annexed of M. The defendants relied upon the Trade Union Act, 1871, s. 4, and contended that the
F court could not entertain the present action:—

HELD: the Trade Union Act, 1871, s. 4, gave the court no power to entertain this action, and, as the defendant union was at common law an unlawful association, the action could not be maintained apart from the Trade Union Act, 1871.

[EDITORIAL NOTE. The Trade Union Act, 1871, s. 4, prevents the court from
G entertaining any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members. It has been held that this does not prevent the court from entertaining an action for an injunction or for a declaration or for an account, provided that such an action does not amount to the direct enforcement of such an agreement. The present action, however, is held to be a claim amounting to the direct enforce-
H ment of such an agreement. If, in such circumstances, it could have been shown that the union was a lawful body at common law, there would have been a common law jurisdiction to entertain this action, but it is held that this union is an unlawful body at common law, with the result that the action cannot be entertained at all.

AS TO UNENFORCEABLE AGREEMENTS, see HALSBURY, 1st Edn., Vol. 27, Trade and Trade Unions, pp. 615-621, paras. 1159-1163; and FOR CASES, see DIGEST, Vol. 43, pp. 96, 97, Nos. 1004-1022.]

Cases referred to:

(1) *Gozney* v. *Bristol Trade & Provident Society*, [1909] 1 K.B. 901; 43 Digest 92, *962*; 78 L.J.K.B. 616; *sub nom. Gozney* v. *Bristol, West of England & South Wales Operatives' Trade & Provident Society*, 100 L.T. 669.

(2) *Baker* v. *Ingall*, [1912] 3 K.B. 106; 43 Digest 106, *1107*; 81 L.J.K.B. 553; 105 L.T. 934.

(3) *Howden* v. *Yorkshire Miners' Assocn.*, [1903] 1 K.B. 308; 43 Digest 106, *1122*; 72 L.J.K.B. 176; 88 L.T. 134; *affd. sub nom. Yorkshire Miners' Assocn.* v. *Howden*, [1905] A.C. 256.

(4) *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite, General Union of Operative Carpenters & Joiners* v. *Ashley*, [1922] 2 A.C. 440; 43 Digest 100, *1043*; 91 L.J.Ch. 688; 128 L.T. 65; *affg.*, [1921] 2 Ch. 399.

(5) *Russell* v. *Amalgamated Society of Carpenters & Joiners*, [1912] A.C. 421; 43 Digest 94, *987*; 81 L.J.K.B. 619; 106 L.T. 433; *affg.*, [1910] 1 K.B. 506.

(6) *Hornby* v. *Close* (1867), L.R. 2 Q.B. 153; 43 Digest 109, *1150*; 36 L.J.M.C. 43; 15 L.T. 563.

(7) *Farrer* v. *Close* (1869), L.R. 4 Q.B. 602; 43 Digest 93, *968*; 38 L.J.M.C. 132; 20 L.T. 802.

(8) *Cullen* v. *Elwin* (1904), 90 L.T. 840; 43 Digest 105, *1098*.

(9) *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; 43 Digest 93, *972*; 80 L.J.Ch. 315; 104 L.T. 267.

(10) *Thorne* v. *Motor Trade Assocn.*, [1937] A.C. 797; [1937] 3 All E.R. 157; Digest Supp.; 106 L.J.K.B. 495; 157 L.T. 399.

(11) *Swaine* v. *Wilson* (1889), 24 Q.B.D. 252; 43 Digest 91, *950*; 59 L.J.Q.B. 76; 62 L.T. 309.

(12) *Knowles* v. *Booth* (1883), 32 W.R. 432; 25 Digest 289, *3*.

(13) *Kelly* v. *National Society of Operative Printers' Assistants* (1915), 84 L.J.K.B. 2236; 43 Digest 99, *1038*; 113 L.T. 1055.

(14) *Denaby & Cadeby Main Collieries, Ltd.* v. *Yorkshire Miners' Assocn.*, [1906] A.C. 384; 43 Digest 95, *994*; 75 L.J.K.B. 961; 95 L.T. 561.

(15) *Evans (Joseph) & Co.* v. *Heathcote*, [1918] 1 K.B. 418; 43 Digest 91, *954*; 87 L.J.K.B. 593; 118 L.T. 556.

(16) *McLuskey* v. *Cole*, [1922] 1 Ch. 7; 43 Digest 96, *1019*; 91 L.J.Ch. 242; 126 L.T. 269.

PRELIMINARY ISSUE arising out of an action by the plaintiff, as administrator of the estate of James John Miller, to recover the sum of £123 15*s*., or, alternatively, the sum of £80 or thereabouts, as arrears of superannuation payable to the deceased. The defendant union relied upon the Trade Union Act, 1871, and said that they were an unlawful association at common law, and that therefore the court could not entertain the action. It was ordered that the point of law should be set down for hearing as a preliminary issue.

G. G. Baker for the plaintiff.

Geoffrey C. Hutchinson for the defendants.

Hutchinson: The onus is upon me to show that the defendant union is an illegal association at common law. By the Trade Union Act, 1913, it is deemed to be a trade union if registered as such. It does not matter whether or not it is lawful or unlawful at common law. In any event, it is entitled to the protection of the Trade Union Act, 1871, s. 4. At common law, the defendant union would have been an unlawful association, because its objects are in restraint of trade. The effect of that would have been that the union could not have sued or have been sued at common law. The Trade Union Act, 1871, removed that disability, but, under the provisions of that Act, the courts are precluded from entertaining this action. The agreement sued upon in this action is an agreement to provide benefits for a member, and that is an action the court is precluded from entertaining. Apart from any question of legality or illegality of the defendant union being an association in restraint of trade, if it is in fact registered as a trade union under the Act of 1913 it is deemed to be a trade union, and, if it is deemed to be a trade union, it is entitled to the protection of the Act of 1871. The purpose of the Act of 1913 was to obviate an inquiry at common law. The effect of the rules of the union is to enable the committee to apply the funds of the union for the purposes of a strike, and that is a purpose in restraint of trade. [Counsel referred to *Russell* v. *Amalgamated Society of Carpenters & Joiners* (5), *Hornby* v. *Close* (6), *Farrer* v. *Close* (7) and *Cullen* v. *Elwin* (8).]

Baker: Whether or not the plaintiff can sue the defendant union must depend upon its being a legal association at common law. It is a legal association, because there is nothing in its rules which is in restraint of trade. In any event, the superannuation part of its rules is clearly severable from any rules which may be found to be in restraint of trade. Also, the action is not an action directly to enforce any matter mentioned in the Trade Union Act, 1871, s. 4. This action was commenced under the Friendly Societies Act, 1898, s. 58 (6), and the defendant union is a lawful association, whether it is a trade union or not. The rules of the society are not illegal as being in restraint of trade. It has a political fund, a general fund, and a superannuation fund, and the superannuation is to be invested separately. It is always open to the court to sever that part of a contract which is legal from those parts which are illegal, provided there is no indissoluble nexus between them. [Counsel referred to *Osborne* v. *Amalgamated Society of Railway Servants* (9), *Thorne* v. *Motor Trade Association* (10), *Gozney* v. *Bristol Trade & Provident Society* (1), *Swaine* v. *Wilson* (11), *Knowles* v. *Booth* (12), *Kelly* v. *National Society of Operative Printers' Assistants* (13), *Denaby & Cadeby Main Collieries, Ltd.* v. *Yorkshire Miners' Association* (14), *Russell* v. *Amalgamated Society of Carpenters & Joiners* (5), *Joseph Evans & Co.* v. *Heathcote* (15), *Baker* v. *Ingall* (2), and *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite* (4).]

Hutchinson, in reply: It may be that a trade union has objects which are perfectly legal at common law, but, if the main purpose of the union is in restraint of trade, the subsidiary purposes can be disregarded. The effect of the 1913 Act is that, if it is registered as a trade union, it must be deemed to be a trade union for all purposes. All the cases which have been cited on the question of severability can be divided into two classes—

namely, cases in which it was sought to restrain a union from expelling a member and cases in which it was sought to recover a benefit. The cases which have been relied upon by my friend were all cases in which the union was seeking to expel a member. There is a difference between an expulsion case and a case in which a member seeks to enforce a benefit. Continuance of membership involves the right to benefit, but that arises A only incidentally. The main purpose of an expulsion case is to enable a member to retain his status as a member of the union, but that is not the purpose of this action. The object of the present action is to obtain a decision as to whether or not somebody is entitled to benefits under the rules of the union. That is not a claim which arises incidentally, B but is the main purpose of this action. [Counsel referred to *Russell* v. *Amalgamated Society of Carpenters & Joiners* (5), *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite* (4), and *McLuskey* v. *Cole* (16).]

C

MORTON, J.: By his statement of claim in this action, the plaintiff, Henry Miller, alleges that the Amalgamated Engineering Union are a lawful association at common law, registered under the Trade Union Acts, 1871-1927, with their registered office at 110, Peckham Road, in the county of London. D

He also alleges that one James John Miller, referred to in the statement of claim as "the deceased," was at all material times until his death a fully qualified member of the defendants, and was, and had been for some years prior to his death, entitled to superannuation benefit in accordance with the rules of the defendants. E

He further states that the deceased was admitted to a certain hospital in 1931, and there remained until he died on May 26, 1936, and that letters of administration with the will annexed to the estate of the deceased were granted to the plaintiff on June 24, 1936, out of the Principal Probate Registry. F

Then by para. 6 the plaintiff alleges that, apart from a period between June and Oct., 1931, the superannuation benefit to which the deceased was entitled was not paid to him.

Then there are certain other allegations to the effect that the payments were withheld by the defendants at the request of the deceased, or, G alternatively, with the consent of the deceased and in accordance with the practice of the defendants not to pay benefits to members under the care of public institutions.

By para. 9 he says:

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> In the circumstances aforesaid a promise by the defendants to make payment of arrears of superannuation benefit on the request of the deceased is to be implied.

Then para. 10 states:

> The arrears of superannuation benefit owing to the deceased at his death is admitted by the defendants to be the sum of £80 or thereabouts but is in fact the sum of £123 15*s*.

Para. 11 states:

> The defendants have refused to pay to the plaintiff the sum of £123 15*s*. or any part of it.

Paras. 12 and 13 contain references to the rules containing provisions for the settlement of disputes, and an allegation that the defendants A have refused, or neglected to allow, the dispute to be settled according to the rules.

The plaintiff claims:

> (1) A declaration that the defendants are bound to pay to the plaintiff arrears of superannuation benefit owing to the deceased at his death. (2) Payment by the B defendants to the plaintiff of the sum of £123 15*s*. In the alternative: (3) an account of what sum was due to the deceased at his death from the defendants for arrears of superannuation benefit; and (4) payment by the defendants to the plaintiff of the sum found due on the said account. (5) Alternatively, the plaintiff claims a declaration that at the time of his death the deceased was a fully qualified member of the defendants and that the plaintiff is entitled to have his claim for payment of the benefit due to the deceased decided in accordance with the rules of the defendants and that the right of the plaintiff in such respect is not prejudiced C or debarred by the failure of other relatives of the deceased to join in such claim. (6) Alternatively, the plaintiff claims an injunction against the defendants to restrain them from misapplying the funds of the defendants by the retention or application for the benefit of other members of the moneys which under the rules of the defendants should have been paid to the deceased.

Then in any event the plaintiff asks for further or other relief, and D costs.

I have referred to the statement of claim fully because one of the questions which I have to determine in this action is whether or not this action is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide E benefits to members, and for that purpose it is necessary, I think, to have regard to the whole of the statement of claim, in order to see what was the object with which this proceeding was instituted.

By para. 1 of the defence it is stated:

> The defendants deny that they are a lawful association at common law as alleged F in para. 1 of the statement of claim. The defendants are a trade union and are an unlawful association at common law. They will refer to their rules for their full terms and effect. The defendants admit that they are registered under the Trade Union Acts, 1871 to 1927, and that their registered office is at 110, Peckham Road, in the county of London.

Then para. 2 states:

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> The defendants will rely upon the Trade Union Act, 1871, and will contend that this honourable court cannot entertain the present action.

I need not, for reasons which will shortly appear, read any further part of the defence, but an application was made for particulars under para. 1. Particulars are asked:

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> (*a*) of the allegation that the defendants are a trade union, showing on what facts or rules the defendants rely in support thereof, (*b*) of the allegation that the defendants are an unlawful association at common law, showing on what facts or rules the defendants rely in support thereof.

To that the reply was:

> (*a*) The defendants are a trade union and are registered under the Trade Union

> Acts, as a trade union. (*b*) The defendants rely upon all and every word of each and every rule of the said defendant trade union.

Upon that, the plaintiffs, I am told, sought further particulars, but SIMONDS, J., declined to order any further particulars to be given.

On Feb. 8, 1938, an order was made by consent of both parties whereby it was ordered that the point of law raised in paras. 1 and 2 of the defence, which I have just read, should be set down within 14 days after the passing and entering of the order for hearing by a judge alone in Middlesex of the preliminary issue. It is common ground that this order was made pursuant to R.S.C., Ord. 25, r. 2, which is in the following terms:

> Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

Then r. 3 of the same order is in these terms:

> If, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole question, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the court or judge may thereupon dismiss the action or make such other order therein as may be just.

Thus, the position is that I have to consider the points of law raised by paras. 1 and 2 of the defence, and, having considered and decided them, R.S.C., Ord. 25, r. 3, gives me a certain discretion in certain events.

Mr. Geoffrey Hutchinson, for the defendants, has argued to the following effect on these points of law. He says, first of all, that at common law the defendant union is an unlawful association, because its objects are in unlawful restraint of trade, the result being, as he says, that the defendant union could not have been sued at common law. He also says that, even if the defendant union had been a lawful association at common law, it could not have been sued at common law in its name, the only possible procedure being one against its officials; and he says that, this action having taken the form that it has, even if the defendant union is a lawful association, they cannot be sued except subject to the provisions of the Trade Union Acts, 1871-1927. In the view which I take of this case, the question whether this latter contention is correct or incorrect does not arise.

Counsel for the defendants then went on to argue that, although the Trade Union Act, 1871, enabled an association which is unlawful at common law to be sued in certain cases, the court is unable to entertain the present action by reason of the provision of the Trade Union Act, 1871, s. 4. As to the question whether or not the defendant union is a trade union within sect. 4 of the Act of 1871, counsel for the defendant union says, first, that the defendant union comes within the definition of a trade union in the Trade Union Acts, and, secondly, that, whether or not the defendant union comes within that definition, it must be deemed to be a trade union for the purpose of the Act by reason of certain provisions in the Trade Union Act, 1913, s. 2.

In order to ascertain whether or not the defendant union is a trade union within the meaning of the Act, and whether or not it is an association unlawful at common law, it is necessary to consider, first of all, the relevant statutory provisions, and, secondly, the rules of the defendant union. The Trade Union Act, 1871, s. 3, provides:

> The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

That was no doubt the result of the fact that, in certain cases, an association unlawful at common law might be sued. However, certain limitations are put upon them by sect. 4, and I shall now read the portions of that section which are relevant for the purpose of this action:

> Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely . . . (3) any agreement for the application of the funds of a trade union (*a*) to provide benefits to members . . . but nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

The definition of a trade union in the Act of 1871 was afterwards partly repealed, and, by the Trade Union Act Amendment Act, 1876, s. 16, it was provided as follows:

> So much of sect. 23 of the principal Act [the Trade Union Act, 1871] as defines the term trade union, except the proviso qualifying such definition, is hereby repealed, and in lieu thereof be it enacted as follows: The term "trade union" means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

Then the Trade Union Act, 1913, s. 1, provides:

> (1) The fact that a combination has under its constitution objects or powers other than statutory objects within the meaning of this Act shall not prevent the combination being a trade union for the purposes of the Trade Union Acts, 1871-1906, so long as the combination is a trade union as defined by this Act, and, subject to the provisions of this Act as to the furtherance of political objects, any such trade union shall have power to apply the funds of the union for any lawful objects or purposes for the time being authorised under its constitution. (2) For the purposes of this Act, the expression "statutory objects" means the objects mentioned in the Trade Union Act Amendment Act, 1876, s. 16, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members.

Counsel for the defendants has submitted that the defendant union is a combination which comes within every portion of that definition except the portion which deals with the regulations of the relations between masters and masters. I must turn to the rules of the society to see whether that contention is well-founded. The Trade Union Act, 1913, s. 2, is as follows:

> (1) The expression "trade union" for the purpose of the Trade Union Acts, 1871-1906, and this Act, means any combination, whether temporary or per-

> manent, the principal objects of which are under its constitution statutory objects: Provided that any combination which is for the time being registered as a trade union shall be deemed to be a trade union as defined by this Act so long as it continues to be so registered.

As is apparent from the portions of the pleadings in this action which I have read, it is admitted that the defendant union is for the time being registered as a trade union, and I think that Mr. Hutchinson's A contention, in view of this fact, that it is to be deemed to be a trade union for the purposes of the Trade Union Acts, is well-founded. However, I propose to consider also, in the course of going through some of the rules, whether or not it is in fact within the definition contained in the Act. B

I think that there is nothing more that I need read in the Trade Union Acts, except the Trade Disputes and Trade Unions Act, 1927, s. 8 (1), which enacts:

> This Act may be cited as the Trade Disputes and Trade Unions Act, 1927, and C shall be construed as one with the Trade Union Acts, 1871-1917, and this Act and the Trade Union Acts, 1871-1917, may be cited together as the Trade Union Acts, 1871-1927.

The rules of the union are somewhat voluminous, and I shall refer only to those which seem to me particularly relevant to one of the questions which I have to decide—namely, whether this defendant D union is an association or combination which is unlawful at common law. By r. 1 (1), which is headed "Name, objects, and constitution," it is provided:

> The union formed under these rules, hereinafter called "the union," shall be named the Amalgamated Engineering Union. It shall be a registered trade union. E The union shall consist of male workers engaged in the engineering, shipbuilding, and kindred trades, together with such trades as may be represented by trade unions hereinafter amalgamating with the union. Sections shall be established covering grades of membership in accordance with the contributions and benefits relating thereto.

Then the objects of the union are stated by r. 1 (2), but, although they F are of some importance, I do not think that I need read more than three paragraphs from this sub-rule. One of the objects is stated to be:

> The negotiation and settlement of differences and disputes between the members of the union and employers by collective bargaining and agreement, withdrawal of labour or otherwise.

G

Then it says:

> In order to achieve the above objects the union shall have power, in addition to other powers conferred by law or by these rules, to impose such restraints upon the labour of its members or generally to interfere, whether such interference is in restraint of trade or not but so far only as may otherwise be lawful, with the trade or conduct of such industries, businesses, and occupations as may be deemed H expedient.

Then the same rule continues:

> The union if a constituent part of the Trades Union Congress shall be empowered to take such action by way of a strike as may be determined from time to time by the general council of the Trades Union Congress, either separately or in conjunction with the National Executive of the Labour Party. In particular the union shall have

> power to provide funds for maintaining all or some of the benefits from time to time authorised in pursuance of these rules, and for the establishment or maintenance of any undertaking of any kind, financial or otherwise, authorised by the union, and for any action, including collective bargaining, striking, withholding of labour, taking action under the Trade Boards Act or other statutes either severally, or jointly, or in conference, securing agreements concerning wages or other conditions of the contract of service, whether in defence of its own members, or in support of other workers of allied or other industries, which may, in the opinion of the union or of its executive council, be deemed to be calculated to further the interests of the union or of the trade-union movement generally.

It is to be observed that under that cl. 2 there is no separation made of any particular fund for any particular purpose. The union is to have power to provide funds for various purposes, which include the providing of benefits, and include any action, including collective bargaining, striking, and so on.

By r. 13, there are certain provisions that I do not think I need read, regarding the constitution of districts, the setting up of district committees, and the instituting of shop committees and shop stewards. I think that I need refer only to the facts that the district committees are to define systematic overtime in their respective districts, and are to have power to define all claims for overtime made under the plea of emergency, and members must not under this plea work more than the stipulated amount of overtime without the consent of the district committee.

Then under sub-rule (17):

> The powers and duties of shop stewards, shop committees, and conveners shall include the following: To examine and sign at least once a quarter the contribution cards of all members, to use every endeavour to see that all men starting are duly qualified trade unionists, and that all persons are receiving the approved rates and complying with the practice of the shop and district, and for these purposes to examine cards and pay-tickets, and to report to the district committee any case in which the position is not satisfactory and cannot be adjusted within the shop. . . .

Then by sub-rule (20) it is provided:

> No general strike shall be entered upon in any district affecting the whole of the members unless carried by a majority of three votes to two of the members voting of said district; a majority to decide on a settlement. The vote must be taken by ballot. The executive council, or the colonial councils, having given the district committee permission to take such a vote, shall have no power to interfere with its operation.

By sub-rule (21) it is provided that:

> No member shall ask for or take work by any system of payment by results or contract in any firm or factory where such system of payment does not exist without the approval of, and in conformity with the conditions as laid down by the district committee.

It is apparent from that that the district committee and the shop committee have considerable control over the actions of the members of the defendant union.

Then by r. 15 (8) it is provided:

> The executive council shall have power to take a ballot vote of the members to authorise the raising of levies to assist any effort to improve the position of the union, or the general trade union or labour movement, and shall notify the branches when such levies must be charged, and shall have power to make grants from funds so raised by levy from time to time, according to their discretion, but the reasons

> for arriving at decisions shall be clearly stated to member or branches claiming to know them.

Then there is a provision as to voting, which I think does not matter. Then :

> In the event of a district dispute the executive council shall, on the application of the district committee, take a ballot vote of the whole of the union for a levy in order to do away with extraneous collections, or excess levies in districts surrounding strike areas. Such levy shall not exceed 6*d*. per member per week, and shall not be retrospective, and shall not be in force for more than two months without a further ballot vote being taken as to the continuation of the same.

Thus, under that there is power to raise the money from the members by a levy, which appears to be a compulsory levy, for purposes which would, I suppose, include a strike.

Then r. 20 lays down certain rules as to the jurisdiction of the executive council to hear appeals, and I need refer, I think, only to sub-rule (1) :

> As regards the jurisdiction of the executive council to hear appeals from branches or members. Where the executive council specifically order any act to be done and the branch or member is dissatisfied, the branch or member must comply with the order of the executive council before proceeding with a further appeal, provided that the executive council must decide such appeal within three weeks of the case being presented to them.

That again is an illustration of the control which is given to the executive council over the acts of individual members.

Then r. 21 is, I think, of great importance. Rule 21 (1) deals in the following terms with the expulsion of a member :

> Without prejudice to any other grounds of expulsion herein contained any member of the union who, in the opinion of his branch or the executive council, shall have injured or attempted to injure the union, or worked or acted contrary to the interests of the union or its members, or have attempted to break up or dissolve the union otherwise than as allowed by these rules, or otherwise brought the union into discredit or refused to comply with the order or decision of any committee, council, or conference having jurisdiction over such member under these rules or requested or taken work from any employer at any place where or when a trade dispute exists between such employer and the union or any branch thereof, or obtained or attempted to obtain any of the benefits of the union by means of misrepresentation, or have knowingly participated in or been a party to any fraud perpetrated upon the union, or any misappropriation or misapplication of its funds or the funds of any branch thereof, or whose conduct shall have been otherwise inconsistent with the duties of a member of this union, or who being an officer shall have refused to perform the duties imposed upon him by these rules or any of them, may be expelled by his branch, with the approval of the executive council, or he may be excluded by the executive council from the union, and shall thereupon, subject to his right of appeal as in these rules provided, cease to be a member thereof. Every expelled member shall cease to have any claim on the funds and benefits of the union, and shall forfeit all right to participate in the privileges thereof.

Then there is a provision as to giving notice of the intention to proceed against any member.

That, of course, is a very striking power which is invested in the committees or officials of this particular union, and it seems to involve that any man, no matter how many contributions he may have paid to the funds, and no matter how much superannuation benefit he may thereby have become entitled to, must, if he disobeys the orders and decisions of the committee or council, be liable to forfeit every benefit which he would otherwise have had under the rules. That, of course, supplies a very strong weapon for compelling any man to take part, for example, in a strike, whether or not he desires to take such part, and it is a rule which is, in my opinion, of great importance in ascertaining whether, at common law, and apart from the Trade Union Acts, the defendant union is an unlawful association.

I think that I need refer only briefly to r. 28, which deals with donation benefit. It is perhaps worthy of notice that by subrule (2):

> Any member who may be signing after a strike, shop dispute or lock-out shall have his donation benefit made up to the full scale for his section from an auxiliary grant.

Then r. 29 (1) provides:

> Should any member be unemployed from any of the causes herein named, he shall be entitled to contingent benefit at the rate of 5*s.* per week upon production of evidence satisfactory to the executive council.

The causes referred to in that rule are, broadly speaking, strikes or withdrawals of labour.

Reading the rules as a whole, I do not entertain the slightest doubt that the defendant union is a trade union within the meaning of the Trade Union Acts. Indeed, although the point is not, I think, conceded by Mr. Baker, on behalf of the plaintiff, it was hardly seriously argued. As I have already said, whether that is right or wrong, I do not see any flaw in Mr. Hutchinson's argument that the defendant union, being admittedly registered as a trade union under the Acts, must be deemed to be a trade union within the meaning of the Acts. Nor does counsel for the plaintiff draw my attention to any flaw in that argument.

The next question which I have to determine is whether or not this action is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits for members. Mr. Baker has referred me to certain authorities on this aspect of the case—for example, *Gozney* v. *Bristol Trade & Provident Society* (1), and in particular an observation of Fletcher Moulton, L.J., at p. 918. He has also referred to *Baker* v. *Ingall* (2), at p. 123—a quotation by Kennedy, L.J., who delivered a dissenting judgment in the Court of Appeal—and a passage from the judgment of the Earl of Halsbury, L.C., in *Yorkshire Miners' Association* v. *Howden* (3). Lastly, Mr. Baker referred me to, and strongly relied upon, *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite* (4). He relied strongly upon certain passages in the opinions; first, a passage in that of Lord Buckmaster, at p. 448:

> Looking at the words of the section alone [the Trade Union Act, 1871, s. 4], unaided and unembarrassed by previous decisions, I should have thought it plain that an action which in fact asks for nothing but a declaration as to the construction of a rule as to membership and as incident thereto, an injunction, was not an attempt to enforce directly any such agreement as that referred to in the statute. It is, of course, true that no such claim could lie unless there were some right of property possessed by the member by virtue of his membership. And one of the most obvious instances of such right is his right to share in the benefits provided for members.

> But in this action there is no direct attempt to interfere with the application of the funds at all. It is nothing but a declaration as to membership with an injunction in its support. It appears to me that it is a totally different proposition to say that a man claims to possess rights and that he seeks to enforce the obligations they create. The latter may be prevented by the statute ; the former is not.

Applying these words to the case before me, it is, I think, plain that there
is in the present action a direct attempt to interfere with the application A
of the funds, and it could not be said of this action, as was said by LORD
BUCKMASTER, in *Braithwaite's* case (4), that it is nothing but a
declaration as to membership and an injunction in its support. On the
contrary, the whole essence of this action is that the plaintiff is saying
to the defendants : " You owe me something under the rules, and you B
must pay it. You owe me that sum by way of a benefit, and that
benefit is to be paid out of the funds of the defendant union." It seems
to me that, although in this case there are certain alternative claims,
claims 5 and 6, which, if they had stood alone, if the statement of claim
had been framed in a very different way, might possibly have been outside C
the provisions of sect. 4—and as to that I express no opinion—
still, the action, framed as it is, with the allegations of fact which the
statement of claim contains, and with the claims for the money which the
statement of claim contains, is a clear instance of an action seeking
directly to enforce an agreement for the application of the funds of the D
trade union provided for members. I see no parallel between the present
action and the action which LORD BUCKMASTER was considering.

Mr. Baker also relied upon other passages in the judgment. I do not
think that I need refer to them at length. It seems to me that I must
look at this proceeding—and there is only one proceeding, not two—and E
inquire whether or not it comes within the wording of the section.
In my opinion, it clearly does.

The last question which I have to consider is this. Is the defendant
union an association unlawful at common law, so that no action can be
brought to enforce payment of any sum which may be payable under F
its rules ? It is clear that the rules of the defendant union impose
very definite restrictions upon the way in which the members of it can
carry on their trade, but, as was said by LORD MACNAGHTEN in *Russell* v.
Amalgamated Society of Carpenters & Joiners (5), at p. 430, it is not
every restraint of trade that is unlawful. The illegality at common G
law of the restraint of trade depends upon the nature and extent of
the restraint. Mr. Hutchinson has referred me to the case which I have
just quoted, and has argued that, if, as was held by LORD MACNAGHTEN,
LORD SHAW OF DUNFERMLINE and LORD ROBSON, in that case, the
respondent society in that case was an unlawful association at common H
law, then *a fortiori* the defendant union in the present case is an unlawful
association at common law also. I do not propose to state in detail
the facts of *Russell's* case (5), or to compare the rules of the respondent
society in that case with the rules of the defendant union in this case.
It is sufficient to say, I think, that, having carefully considered both

sets of rules, I am satisfied that the defendant union in the present case is no less an association unlawful at common law than was the respondent society in *Russell's* case (5).

Mr. Baker said all that he possibly could say in support of the plaintiff's case, and he endeavoured to convince me, on this branch of the case, that
A there is nothing in the defendant union's rules which is in restraint of trade, and that, if there is, the rules have two co-ordinate objects, with no nexus between them, these objects being (i) the object of restraint of trade, and (ii) the object of providing benefits for members. I agree that the objects of the union embrace both objects of restraint of
B trade and of the providing of benefits for members. In my view, the former are the primary objects, and, further, there is this very strong nexus or connection between the two, that, if a member under r. 21 disobeys the orders of the council as to his behaviour, for example, in regard to a strike, he forfeits all the benefits which he otherwise
C would have got from the funds.

Mr. Baker has referred to r. 33, and has pointed out that it provides for the allocation to a superannuation reserve fund of a sum of not less than 2*s*. per quarter in respect of certain members, and it provides for the investing of those moneys apart from the general funds of the
D union, and those moneys are not to be used:

> for any purpose except reinvestment, subject to executive council having the power to transfer from the superannuation reserve fund to the general fund, an amount equal to one-third of the total annual cost of superannuation benefit, until, in the opinion of executive council, the general fund is in a position to meet the greater proportion of superannuation benefit.

E I do not think that it could possibly be said that the mere existence of this superannuation reserve fund amounts to a severance between the funds which are to be devoted to benefits for members and funds which are to be devoted to other purposes. I think it is clear from the rule that contributions go into one general fund, and are applicable to all the
F purposes of the association. Here one has merely machinery for providing the keeping up of the superannuation benefits in case at any time the general funds are insufficient to keep them up. The result is that, in my view, one cannot separate, in this case, the objects in restraint of trade and the objects which deal with providing benefits for members.

G The result of that is that, in my view, I am bound to hold that the court is not able to entertain the procedure which I am now considering, by reason of the Trade Union Act, 1871, s. 4, and that, the defendant union being an association unlawful at common law, the action could not be maintained apart from the Trade Union Act, whether or not it could
H have been so maintained if the defendant union had been an association lawful at common law.

In these circumstances, I have to consider what form of order I ought to make. Under R.S.C., Ord. 25, r. 3, which I have already read, if I am of opinion that the decision of the point of law before me substantially disposes of the whole action, I have a discretion to dismiss the action or to make such other order therein as may be just. Mr. Baker has urged me not to dismiss the action, but to leave it in being for certain purposes which he has laid before me. I am not disposed to do that. If the action is one that the court cannot entertain, it is an action, in my view, to which should be put an end, here and now, and I propose to dismiss the action. A

Action dismissed with costs.

Solicitors: *Scott Duckers & Co.* (for the plaintiff); *Evill & Coleman* (for the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

B

Re A DEBTOR (No. 975 of 1937), THE DEBTOR *v.* THE PETITIONING CREDITOR AND THE OFFICIAL RECEIVER.

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), **April 26, 27, 28, 1938.**] C

Bankruptcy—Petitioning creditor's debt—Divorce damages—Order to pay part to petitioner direct—Bankruptcy Act, 1914 (*c.* 59), *s.* 1 (1) (*g*)—*Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *s.* 189 (3).

In divorce proceedings the jury awarded in Feb., 1937, against the debtor, the co-respondent, £2,000 damages. An order was made on D Feb. 15, 1937, directing £1,000 to be lodged in court within 14 days, and the other £1,000 within 28 days. This order not being complied with, on Mar. 8, 1937, the court ordered the debtor to pay the £2,000 to the petitioner in the divorce proceedings (who was the petitioning creditor in these proceedings), upon the joint undertaking of the petitioner and his solicitor to abide the decision of the court as to its ultimate application. The debtor failed to comply with this order, E and a further order was made on Nov. 1, 1937, in the following terms: "That the co-respondent do within 7 days after the service of this order pay to the petitioner the sum of £1,000, part of the sum of £2,000 the amount of damages assessed herein." This further order also was not complied with, and a bankruptcy notice, founded upon the order of Nov. 1, 1937, was then served upon the co-respondent:— F

Held: (i) the order of Nov. 1, 1937, was one in which the destination of the £1,000 in respect of which it was made was finally determined, and the creditor was entitled to serve a bankruptcy notice in respect of the amount specified therein.

(ii) there was jurisdiction in the Divorce Court, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 189 (3), to make the order of Nov. 1, 1937, that £1,000, part of the £2,000 damages, should G be paid to the petitioner direct.

Re Muirhead, Ex p. Muirhead (1) *distinguished.*

[EDITORIAL NOTE. It was decided in *Re Muirhead, Ex p. Muirhead* (1) that an order in the form of the order herein made on Mar. 8, 1937, was not an order upon which a bankruptcy notice could be founded, as it did not finally determine the destination of the sum to be paid. The order of Nov. 1, 1937, was an order H under which the petitioner was to receive £1,000 for his own use and benefit, and upon which he could have levied execution forthwith. The Divorce Court has power under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 189 (3), to make an order that part of the damages shall be paid to the petitioner for his own use and benefit, although no part of the damages awarded has been paid into court, or to some person, to be held by him and to be dealt with as the court shall direct.

As to Divorce Damages as a Petitioning Creditor's Debt, see HALSBURY, Hailsham Edn., Vol. 2, pp. 57, 58, para. 70; and for Cases, see DIGEST, Vol. 4, p. 124, Nos. 1127, 1128.]

Cases referred to:

(1) *Re Muirhead, Ex p. Muirhead* (1876), 2 Ch.D. 22; 4 Digest 124, *1127*; 45 L.J.Bcy. 65; 34 L.T. 303.

(2) *Re H. B.*, [1904] 1 K.B. 94; 4 Digest 97, *872*; 73 L.J.K.B. 1; 89 L.T. 592.

(3) *Patterson* v. *Patterson & Graham* (1870), L.R. 2 P. & D. 189; 27 Digest 462, *4816*; 40 L.J.P. & M. 5; 23 L.T. 568.

(4) *Re A Debtor* (*No.* 76 *of* 1929), [1929] 2 Ch. 146; Digest Supp.; 98 L.J.Ch. 334; 141 L.T. 250.

(5) *Monsell* v. *Monsell & Cain*, [1922] P. 34; 27 Digest 444, *4571*; 91 L.J.P. 33; 126 L.T. 544.

Appeal by the debtor from a receiving order made by Mr. Registrar Kean.

W. A. L. Raeburn for the appellant.

J. P. Eddy, K.C., and *L. Lewis* for the respondents.

Raeburn: The bankruptcy notice was bad because it was not in accordance with the judgment. The judgment provides in terms that "the co-respondent pay to the petitioner the sum of £1,000, part of the £2,000, the amount of the damages assessed herein." [Counsel referred to *Re H. B.* (2).] There is no power in a judge administering divorce law to make an order for the payment of a sum awarded by the jury direct to the petitioner. Though I cannot be heard here to say that he acted without jurisdiction, I am entitled to say that, though his judgment is valid for all purposes, and can be enforced everywhere, yet it is of no use for the purpose of founding a good petitioning creditor's debt. The bankruptcy court can go behind it. [Counsel referred to *Re Muirhead, Ex p. Muirhead* (1), *Patterson* v. *Patterson & Graham* (3), and *Re A Debtor* (*No.* 76 *of* 1929) (4).] An award of damages by the jury has the effect of making the co-respondent a debtor to the court. The court can then order the co-respondent to pay the amount directly into the registry, or it can order him to pay the amount to such person as it may appoint, virtually as its receiver. The latter course puts into the hands of the receiver the remedies that a judgment creditor would have. The first course is one by which the court, having recovered the money for itself, then orders it to be paid to some certain person. *Patterson* v. *Patterson & Graham* (3) was an attempt to short-circuit this process, and was disapproved by the Court of Appeal in *Re Muirhead, Ex p. Muirhead* (1). The court has in fact, in this case, appointed the petitioner the person to bring bankruptcy proceedings to recover a debt which is, and always has been, a debt to the court. Bankruptcy proceedings cannot be taken on a part of a debt. Even if the petitioner got the £1,000, he could not say: "This is mine to keep." He was still liable to have to settle it, or to do as the court should direct. The second order could not abrogate the undertaking contained in the first. Alternatively, the second order was merely releasing the petitioner from his obligations towards the court *qua* the first half—the first £1,000 of the £2,000.

Lewis : The order was a final determination of the destination of £1,000. Sect. 189 allows the court to make an order before the money is actually collected or received. This was a final order within the meaning of the Bankruptcy Act : see *Monsell* v. *Monsell & Cain* (5).]

SIR WILFRID GREENE, M.R. : The debtor was co-respondent in divorce proceedings brought by the petitioning creditor. In Feb., 1937, at the trial of those proceedings, the jury awarded against the debtor £2,000 damages. On Feb. 15, 1937, an order was made directing £1,000 to be lodged in court within 14 days, and a further £1,000 within 28 days. With this order the debtor failed to comply.

On Mar. 8, 1937, a further order was made in these terms :

> That the co-respondent do within fourteen days of the service of this order pay to the petitioner the sum of £2,000, being the amount of damages assessed herein, upon the joint undertaking of the petitioner and his solicitor to abide by the decision of the court as to its ultimate application.

The reason for that undertaking, of course, is that the court has jurisdiction to deal with damages awarded against a co-respondent, and to direct that they be applied, in suitable cases, wholly or partly for the benefit of the wife or the children of the marriage. Alternatively, part of them, or the whole of them, may, according to the circumstances, be ordered to be paid to the petitioner for his own benefit.

The debtor failed to comply with that order. Accordingly, on Nov. 1, 1937, pursuant to an application to which I shall refer later, an order was made in the following terms :

> That the co-respondent do, within seven days after the service of this order, pay to the petitioner the sum of £1,000, part of the sum of £2,000 the amount of damages assessed herein.

The effect of that order I shall discuss in a later part of this judgment. It is sufficient for the moment to note that the payment of the £1,000 is not conditional, and is not subject to any undertaking on the part of the co-respondent.

That order not having been complied with, on Nov. 19 a bankruptcy notice was served, and that notice was not complied with.

I should mention the terms of the notice, because a point is made upon them with which I shall deal later. The notice referred to the sum to which it related in the following terms :

> The sum of £1,000 claimed by the petitioning creditor as being an amount due on a final judgment or order obtained by him against you in the High Court of Justice, Probate, Divorce and Admiralty Division (Divorce), dated Nov. 1, 1937.

Then follow words in common form.

That notice not having been complied with, on Dec. 13 a bankruptcy petition was filed returnable on Jan. 4, 1938. It was not disputed that the order of Mar. 8, 1937, did not create a debt upon which a bankruptcy petition could be founded. The authority for this proposition is *Re Muirhead, Ex p. Muirhead* (1). He then submitted that the order of Nov. 1, 1937, whereby the debtor was ordered to pay £1,000 to the petitioning creditor without any undertaking, did not any the more create a debt to the petitioning creditor sufficient to support a petition. The reasons which he gave for this were (i) that this order was made without jurisdiction, if its effect was to give the petitioning creditor the right to obtain this £1,000 and keep it for his own benefit, and (ii) that the order ought to be construed, not as having this effect, but as an order of the same character as that of Mar. 8—that is to say, that it left the petitioning creditor subject to any subsequent order of the court as to the final application of the £1,000.

The first of these arguments is based on a misapprehension as to the true meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 189 (3). It was said that under that subsection the court has no power to make a final order as to the destination of the damages awarded unless and until they have been got in, either by payment into court or by payment to the petitioner on behalf of the court. It appears to be the usual practice in the Probate, Divorce and Admiralty Division not to apply for a final order dealing with the destination of the damages until they have been got in. There are obvious reasons of convenience for this. However, there is nothing in the subsection to limit the power of the court in the way suggested, and, in my opinion, the court can make a final order without waiting for the money to be got in.

The second argument is, in my judgment, equally devoid of foundation. The order of Nov. 1 was made upon a summons by the petitioning creditor asking for payment of the whole of the £2,000 to himself, without any undertaking. That application was acceded to to the extent of £1,000, and there is, in my opinion, no justification for construing the order as doing anything other than finally determining the destination of that £1,000, by directing that it should be paid to the petitioning creditor, to be kept by him as his own property. The fact that the order is of this character is sufficient to distinguish the case from *Re Muirhead, Ex p. Muirhead* (1). There the order was similar to the order of Mar. 8 in the present case, and the reason why it was held insufficient to support a bankruptcy petition was that it merely put the petitioner into the position of a conduit pipe for bringing the money to the court, and gave him no rights of his own with regard to it. The order of Nov. 1 is of quite a different character. The Bankruptcy Act, 1914, s. 1 (1) (*g*), provides that:

> any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order.

Such a creditor is entitled to serve a bankruptcy notice in respect of the amount specified in the order. In the present case, the order being of the nature which I have described, it was one which the petitioning creditor was entitled to enforce immediately, for he could have levied execution upon it forthwith. In the result, the appeal fails, and must be dismissed with costs.

Scott, L.J.: I agree.

Clauson, L.J.: I agree. A

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Sidney Pearlman* (for the appellant); *Goodwins* (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*] B

DRIED MILK PRODUCTS, LTD. *v.* MILK MARKETING BOARD.

[Court of Appeal (Greer, Slesser and Clauson, L.JJ.), **March 24, 1938.**] C

Food—Marketing scheme—Fixing prices—Sterilised cream put into bottles—Price fixed for "tinned cream"—Whether applicable to sterilised cream in bottles.

The Milk Marketing Board had statutory power to fix the prices for milk by reference to the different purposes for which the producers sold the milk. It fixed a price for milk manufactured into fresh cream, tinned cream, and milk manufactured into other products. It did not fix any price for sterilised cream as such, nor for bottled cream. Milk was sold to be manufactured into sterilised cream in bottles, and a dispute arose as to the price applicable:— D

Held: the term "tinned cream" included only cream which had been sterilised and put in tins, and did not include sterilised cream in bottles. The price applicable was, therefore, that for "milk manufactured into other products." E

Decision of Goddard, J. ([1937] 4 All E.R. 669) *reversed.*

[EDITORIAL NOTE. In settling the prices to be paid for milk, the board fixed a price to be paid for milk manufactured into tinned cream. The prices were to be fixed with reference to the products into which the milk was to be manufactured. Goddard, J., held that tinned cream was not itself a product, it being established that tinned cream was meant as a trade term for sterilised cream. The product was sterilised cream, and the price fixed with respect to tinned cream therefore applied to sterilised cream put into bottles. The Court of Appeal, however, have taken the view that the plain and ordinary meaning of the words of the contract must be regarded, and that therefore the expression tinned cream does not include bottled cream. F G

As to Milk Marketing Scheme, see HALSBURY, Hailsham Edn., Supp., Agriculture, para. 643; and for Cases, see DIGEST, Supp., Food and Drugs, Nos. 476g-476k.]

Appeal from a decision of Goddard, J., dated Nov. 8, 1937, and reported in [1937] 4 All E.R. 669. H

R. P. Croom-Johnson, K.C., and *L. C. Graham-Dixon* for the appellants.

Hubert Hull for the respondents.

Croom-Johnson, K.C.: "Tinned cream" does not mean cream in tins—that is, fresh cream—but sterilised cream in tins. The judge has misunderstood what was found by the arbitrator, and has thought that, if cream is put into any container and sterilised, it is then tinned cream. This is a contract, and must be construed in the usual way. Sterilised cream put into a bottle is not tinned cream.

Hull : If the contract has two meanings, and one is *ultra vires* the board,
A then the court must give it the second meaning. The board can have no authority to differentiate between any different containers into which the product may be put. [Counsel referred to the Agricultural Marketing Act, 1931, s. 1 (8), and the Milk Act, 1934.] This is a question of construction. Tinned cream does not mean simply cream in tins. That
B is admitted. " Milk manufactured into tinned cream " must be a form of shorthand, because one cannot literally make milk into tinned cream, as it contains no tin. Further, it does not mean cream put into tins, because it is admitted that it must be sterilised. Therefore the words are ambiguous. Otherwise, the purchaser must say how much of the
C cream from each vendor was sold in bottles and how much in tins. That would make the contract unworkable.

Croom-Johnson, K.C., was not called on in reply.

GREER, L.J. : This case is concerned, and is solely concerned, with
D the interpretation of some words in a contract, and nothing that I say, so far as my judgment is concerned, is to be interpreted as deciding one way or another whether or not the settling of the form of contract by the Milk Marketing Board was *ultra vires.* We have nothing to do with that question.

E As it seems to me, the arbitrator was put a simple question as to what was the interpretation to be put upon the words used in the contract. He states the difference between the parties with reference to the construction of the contract, and then says :

> And whereas a dispute has arisen between the purchaser and the board [the
> F manufacturer] as to the appropriate rebate to be allowed by the board to the purchaser in respect of the milk utilised by the purchaser for the purposes aforesaid in that : (*a*) the purchaser contends that upon the true construction of cl. 8 of the said contract and of the second schedule thereto the said milk was manufactured by the purchaser into tinned cream within the meaning of the said schedule.

That is the contention put forward by the respondents. The contention
G by the appellant board, a party to the contract, is :

> that upon the true construction of cl. 8 of the said contract and of the second schedule thereto the said milk was not manufactured by the purchaser into tinned cream within the meaning of the said second schedule but was manufactured into bottled cream in respect of which upon the true construction of the said cl. 8 and of the said second schedule the manufacturing price is 9*d*. per gallon.

H Those two contentions were the only contentions between which the arbitrator was asked to decide, and, in my judgment, the arbitrator was right in saying that, without considering the question whether or not the contract is *ultra vires*, on the facts found by him it was quite impossible to read the words " tinned cream " as meaning " bottled cream."

One looks at the contract, and finds that it is a contract for which the
Milk Marketing Board are responsible. There is no finding in the case
that this form of contract, as settled by the Milk Marketing Board, is
ultra vires the powers of the Milk Marketing Board. We must take it,
therefore, until the contrary is proved, that it was within their powers.
The form which the contract takes is a sale by the manufacturers to the A
board. Then in some way or other the price which is paid is provided
by the agreement, and the regional price originally fixed is reduced, by
means of a discount which is allowed at a later period. One finds out
what that means by the clauses at the back of the contract, and especially
by cl. 8, which deals with surplus milk : B

> If the purchaser shall prove to the satisfaction of the board that any milk delivered
> pursuant to this agreement during any calendar month has been utilised by the
> purchaser or sub-sold and utilised by the sub-purchaser for any of the purposes
> mentioned in the second schedule hereto then and in that case and subject to the
> conditions set out in the said schedule the board shall allow to the purchaser off
> the regional price in respect of every gallon of milk so utilised by the purchaser
> or the sub-purchaser the appropriate rebate in accordance with the scale therein C
> set out.

If we look at the first schedule, we find, first of all, the price that in the
first instance has to be paid by the manufacturer to the farmer. Then
we find, in the second part of the schedule, the provisions which deal
with the amount of the discount that, sooner or later, will have to be D
allowed to the manufacturer, so as to reduce the difference between the
price in the second schedule and the original regional price, and a number
of manufactured products is expressly dealt with in the schedule, the
first being :

> Milk manufactured into cheese (other than soft curd cheese and cream cheese). E
> The price per gallon to be the average price per pound for the previous month of
> finest white Canadian cheese and the finest white New Zealand cheese less a sum
> of 1¾*d*. Provided that this formula shall be varied as from Apr. 1, 1935, in such
> manner as the board thinks fit if the board by resolution so determines and the
> board undertakes to give full consideration to the question whether any such
> variation shall be made. (2) Milk manufactured into butter. The price per gallon
> to be the average price per pound for the previous month of finest white Canadian
> cheese and finest white New Zealand cheese less a sum of 1¾*d*. (3) Milk manu- F
> factured into soft curd cheese and cream cheese, 7½*d*. per gallon. Soft curd cheese
> and cream cheese means cheese which normally is capable of being marketed
> immediately after manufacture. (4) Milk manufactured into condensed milk . . .
> 6*d*. per gallon. Milk manufactured into condensed milk for export . . . On the same
> basis as in respect of milk manufactured into cheese, with a minimum of 4*d*. per
> gallon. Milk manufactured into milk powder . . . 4½*d*. per gallon. Milk manufactured
> into fresh cream . . . 7½*d*. per gallon. Milk manufactured into tinned cream . . . 5*d*. per G
> gallon. Milk manufactured into ice cream . . . 7½*d*. per gallon. Milk manufactured
> into chocolate, 8*d*. per gallon. Natural sterilised milk for export . . . 6*d*. per gallon.
> Milk manufactured into other products . . . 9*d*. per gallon.

It is quite clear that what we are dealing with is not milk manufactured
into tinned cream. It must come under the general words, which are
the last words of the clause, " Milk manufactured into other products." H
It seems to me that it is impossible to read the contract as meaning that,
when it speaks of " milk manufactured into tinned cream," which is not
sterilised until after it has become tinned, and is not sold until after it
has been sterilised, that is the same thing as bottled cream, which also
is not to be sold until after it has been sterilised in the bottles.

For these reasons, notwithstanding the fact that it may have been
supposed, when the form of contract was settled, that adequate protection
was given by the schedule to the producers of cream in bottles,
in competition with cream coming from abroad in tins, notwithstanding
that it may have been intended to produce the result that there should
A be an equal competition between bottled cream and tinned cream,
whether tinned cream as sold in this country or coming from abroad, I
come to the conclusion that it is quite impossible to interpret this agreement
as meaning other than what it says—namely, that, when it deals
with bottled cream, it is dealing with something as a manufactured
B article, which is different from tinned cream.

The only clauses in the statement of the case to which I want to refer are those in paras. 3, 4 and 5, especially para. 5, which must be read in connection with paras. 3 and 4. Para. 5 says:

> Both parties agreed before me that the phrase "tinned cream" in the second
> C schedule was meant to apply to sterilised cream.

Undoubtedly, that is so. The cream that is in tins and sold in tins is not sold until it has become sterilised cream, and, whether one is referring to tinned cream or to bottled cream, this is an agreement which is referring to sterilised cream. The clause goes on:

> D but the parties are at variance on the point whether it does or does not cover sterilised cream which when it is sterilised and sold is in a bottle and not in a tin. The claimants contend that the provision in cl. 2 of the second schedule applicable to the milk in question is "Milk manufactured into tinned cream . . . 5*d*. per gallon." The respondents contend that the provisions of cl. 2 of the second schedule applicable to the milk in question is "Milk manufactured into other products . . . 9*d*. per gallon.',

E After that statement, it seems to me impossible to say that the first
words of para. 5 mean that the parties had given up their contention,
and had agreed that what was meant by the contract was that all they
were talking about was neither tinned cream nor bottled cream, but
sterilised cream, and that therefore there was nothing for the arbitrator
F to decide, the parties having stated what they thought the contract
meant. That would make nonsense of the arbitration and of the award.
I cannot help thinking that the judge was unduly influenced by the fact,
which appears from his judgment, that he was rather impressed with the
idea that it might very well be that that form of contract which had
G been settled by the Milk Marketing Board was *ultra vires*, and ought
to be varied; but how that helps one to construe the words of the
contract I find it difficult to conceive. In construing the contract, you
must look at the words of the contract, and, giving them their plain,
ordinary meaning, I cannot find it in my power to say that the ordinary
H meaning of "tinned cream" is "bottled cream." For these reasons, I
think that this appeal must be allowed, with costs.

Slesser, L.J.: I am of the same opinion. The judge, as I read his judgment, seems to have arrived at his conclusion by the consideration of the agreement which the parties are said to have arrived at, stated in cl. 5 of the award. So stated, both parties agreed that the phrase "tinned cream" in that second schedule was meant to apply to sterilised cream, following the words, to which Greer, L.J., referred, indicating the difference between them.

It is true in a sense that the words "milk manufactured into tinned cream" need some explanation, and the explanation is offered by the agreement between the parties that the words "tinned cream" should mean "sterilised cream," which, none the less, I may add, must be placed in a tin. The judge, having recited those words, says, at p. 671:

> It is not argued on behalf of the Milk Marketing Board that no price is fixed for sterilised cream, but it is said that no price is fixed for sterilised cream which goes into bottles. Bottled cream is not in itself a product. Cream can be called "tinned" if put in a tin. If it is called "bottled," it means that the cream is put into a bottle. I confess I do not see how the cream is a different product because it is put into a different container, even though the last process, sterilisation, is done after the milk is put into the particular container. Once it is clear that the parties intended that tinned cream should be read as referring to sterilised cream, which is the product, the price is fixed for it, whether it is in a tin or a bottle. The provision of a price with reference to the different containers would be *ultra vires*, because the board has no power to fix such a price. The product is sterilised cream, and is the same whether it is put into a tin or into a bottle.

With every respect to the judge, I cannot follow the logic of that construction because it is conceded that the cream which has here to be considered is sterilised. I cannot see how that in itself concludes the question of whether sterilised cream put into a bottle is to be read into the words "Milk manufactured into tinned cream." The words seem to me, on their face, to be unambiguous, and to refer, even with the gloss upon them, to sterilised cream in a tin, and not in a bottle. There has been proved here no trade custom or usage by which it might be said that there must be imported into this contract the term "or bottle" after the word "tin," as being a custom of such general usage that it is to be interpolated into any such contract dealing with this subject-matter. No such suggestion has been made, and the words appear to me to be unambiguous on their face. Therefore, the conclusion arrived at must be that the rebate in respect of tinned cream does not apply to cream which is not tinned, and that such rebate can only be claimed as milk manufactured into other products. I agree that the appeal succeeds.

Clauson, L.J.: I agree, and I do not wish to add anything.

Appeal allowed with costs in both courts.

Solicitors: *Ellis & Fairbairn* (for the appellants); *Reynolds, Sons & Gorst* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

MARGINSON *v.* BLACKBURN BOROUGH COUNCIL.

[MANCHESTER WINTER ASSIZES (Lewis, J.), **March 22, 1938.]**

Estoppel—By record—Two actions depending on same facts—Actions for damage to property and for personal injuries due to one collision—Different causes of action—Plaintiff in second action third party in first—Plaintiff in second action suing in representative capacity.

The plaintiff sued the defendant for damages in respect of injuries received by his daughter and himself, and in respect of the death of his wife, arising out of a collision between a car driven by the plaintiff's wife, and a motor omnibus driven by the defendant's servant. Prior to the commencement of this action, a third person, whose premises had been damaged as a result of this accident, had, in a county court, sued both the present plaintiff and present defendant, each of whom then served upon the other a third-party notice claiming indemnity and contribution in respect of any sum which the plaintiff in the county court action might recover. In this prior action judgment was given against the present plaintiff and present defendant jointly and severally, and it was ordered that they should be liable for the sum and costs in equal shares. The defendant contended that, by reason of the judgment in the county court, the plaintiff was estopped from proceeding in the present action, which was on the same facts as was the action in the county court. The defendant's contention was argued as a preliminary point:—

HELD: the actual questions in this action had never been decided, and the plaintiff was not estopped from proceeding in his action.

[EDITORIAL NOTE. A plaintiff is allowed to bring successive actions in respect of the very same circumstances, provided those circumstances give rise to two different causes of action. The test is not whether the plaintiff had the opportunity of recovering in the first action what he claims in the second, but whether he sought to do so (*Brunsden* v. *Humphrey* (8), at p. 146). It would seem, *a fortiori*, that a person made a third party to proceedings is not forced to make a claim quite separate and distinct from that of the plaintiff, although arising out of the same facts. Still more must this be so where his claim is in a representative capacity, as that of an administrator.

AS TO ESTOPPEL BY RECORD, see HALSBURY, Hailsham Edn., Vol. 13, pp. 418, 419, para. 472; and FOR CASES, see DIGEST, Vol. 21, pp. 164-179, Nos. 230-302.]

Cases referred to:

(1) *Re May* (1885), 28 Ch.D. 516; 21 Digest 214, *520*; *sub nom. Re May, Ex p. House*, 54 L.J.Ch. 338; 52 L.T. 78.

(2) *Henderson* v. *Henderson* (1843), 3 Hare, 100; 21 Digest 174, *276*; 1 L.T.O.S. 410.

(3) *Hoystead* v. *Taxation Comr.*, [1926] A.C. 155; Digest Supp.; 94 L.J.P.C. 79; 134 L.T. 354.

(4) *Priestman* v. *Thomas* (1884), 9 P.D. 210; 21 Digest 168, *251*; 53 L.J.P. 109; 51 L.T. 843.

(5) *Kingston's (Duchess) Case* (1776), 1 East, P.C. 468; 21 Digest 159, *213*.

(6) *Green* v. *Weatherill*, [1929] 2 Ch. 213; Digest Supp.; 98 L.J.Ch. 369; 142 L.T. 216.

(7) *Outram* v. *Morewood* (1803), 3 East, 346; 21 Digest 185, *334*.

(8) *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141; 21 Digest 207, *480*; 53 L.J.Q.B. 476; 51 L.T. 529.

(9) *Leggott* v. *Great Northern Ry. Co.* (1876), 1 Q.B.D. 599; 21 Digest 207, *479*; 45 L.J.Q.B. 557; 35 L.T. 334.

Preliminary Issue of Law as to whether the plaintiff was estopped from proceeding in his action by reason of a prior county court judgment on practically the same facts. On Jan. 24, 1937, the plaintiff was a passenger in a motor car, driven by his wife, which was involved in a collision with a motor omnibus, the property of the defendant council. In consequence of the collision, one Arthur Morris and others sustained damage to their premises, in respect of which they brought an action in the Blackburn and Clitheroe County Court against both the parties to the present action as defendants. The present defendants, by third-party notice, claimed to be indemnified by the present plaintiffs against damages or contribution ordered against them. The present defendants counterclaimed in respect of damage to the omnibus. The present plaintiff defended the said third-party proceedings and the said counterclaim, and likewise instituted third-party proceedings, which were defended in like manner by the present defendants. Each side alleged that the said damage to the property of Arthur Morris was due solely to the negligence of the other. On these issues, the county court judge found that both parties were negligent, and that damages should be recovered against them jointly and severally, with costs in equal shares. The defendants in the present proceedings therefore contended that the present proceedings were founded upon the same circumstances as were the county court proceedings, and that the plaintiff was therefore estopped.

William Gorman, K.C., and *T. M. Backhouse* for the plaintiff: the cause of action in the present case is for personal injuries. This is a different cause of action from that determined in the county court; that was injury to goods. The finding of negligence in the first action does not predetermine the question of negligence in the second action. Estoppel only operates between parties suing in the same right, and the present plaintiff is suing as a personal representative. It is the record of previous proceedings which binds a court in subsequent proceedings.

Wilfrid Clothier, K.C., and *Scholefield Allen* for the defendants: As to the plaintiff's claim as personal representative, in that capacity he claims only in his wife's right. Husband and wife are privies in law, and estoppel affects parties and their privies. The husband was a party to the first action, and the wife was privy to it. She could be estopped, therefore, if she were a party to this present action, and for that reason her personal representative is so estopped.

Lewis, J.: In this case, Fred Marginson, suing on his own behalf and as administrator of Ellen Marginson, deceased, who was his wife, brings an action against the mayor, aldermen and burgesses of the county borough of Blackburn in respect of injuries which he himself received in an accident, and also on behalf of himself and his daughter, as well as in respect of the death of his wife, who was, in fact, driving the car at the time of the accident, and was killed as the result of the accident. He brings the action under the Fatal Accidents Act, and also under the Law Reform Act, in addition to the action at common law to recover damages for his own injuries.

The parties came before me in chambers, on application, and it was then agreed that a matter which was raised in the defence, by the defendants, should be argued as a preliminary point. The matter raised in the defence is contained in the first three paragraphs of the defence which read as follow:

> (1) Before the commencement of this action—viz., on or about Apr. 16, 1937—an action was brought in the Blackburn and Clitheroe County Court, No. of Plaint. R., 589, by one Arthur Morris and one Alice Aspinall and one Ellen Sharples plaintiffs, against the present defendants, the mayor, aldermen and burgesses of the borough of Blackburn, and against the present plaintiff, Fred Marginson, for £30 13*s*., damage alleged to have been caused to the premises of the said plaintiffs, owing to the negligent driving of a motor omnibus owned by the present defendants, and driven by a servant of the present defendants, and to the negligent driving of a motor car by Ellen Marginson, deceased (referred to as the deceased in the statement of claim herein), then the servant and agent and wife of the present plaintiff, at the time and place referred to in para. 2 of the statement of claim in the present action. The present plaintiff, by his defence in the said proceedings alleged that the said damage of £30 13*s*. was solely caused by the negligent driving of the said motor omnibus by the servant or agent of the present defendants. The present defendants by their defence in the said proceedings alleged the said damage of £30 13*s*. was solely caused by the negligent driving of the said deceased, then the servant and agent and wife of the present plaintiff. Further, the present defendants by third-party notice claimed to be indemnified by the present plaintiff against any sum which the plaintiffs in the said proceedings might recover against the present defendants, and for contribution in respect of any such sum, and further, the present defendants counterclaimed against the present plaintiff for damages in respect of repairs to their said motor omnibus amounting to the sum of £66 16*s*., and the present plaintiff by his defence to the said third-party proceedings denied that the damage to the plaintiffs in the said proceedings was caused by the negligence of the present plaintiff or his servant or agent, and further denied the present defendants' right to indemnity or contribution, and further alleged that the said damage of £30 13*s*. was solely caused by the negligence of the present defendants' servant or agent, and further the present plaintiff by third-party notice claimed to be indemnified by the present defendants against any sum which the plaintiffs in the said proceedings might recover against the present plaintiff, and for contribution in respect of any such sum, and the present defendants by their defence to the said third-party proceedings denied that the damage to the plaintiffs in the said proceedings was caused by the negligence of the present defendants or their servant or agent, and further denied the present plaintiffs' right to indemnity or contribution, and further alleged that the said damage of £30 13*s*. was solely caused by the negligence of the present plaintiff's servant and agent, the said deceased. (The defendants will refer at the trial to the pleadings in the said proceedings for their full terms.)
>
> (2) On May 24, 1937, at the Blackburn County Court, before His Honour JUDGE PEEL, K.C., the said action and issues were tried, and upon the said trial the said learned county court judge, upon the issues between the said parties, found that the said damage was caused owing to the negligent driving of the said motor omnibus by the servant or agent of the present defendants, and by the negligent driving of the said motor car by the servant and agent of the present plaintiff, the said Ellen Marginson, deceased, and adjudged that the plaintiffs in the said proceedings recover against the present defendants and the present plaintiff jointly and severally, the said sum of £30 13*s*., which was the agreed damage to the plaintiffs in the said proceedings, and further ordered that the present defendants and the present plaintiff should as between themselves be liable for the said amount of £30 13*s*. and the costs of the said proceedings in equal shares, they having the right of contribution against each other in respect of their liability.
>
> (3) By reason of the matters alleged in paras. 1 and 2 hereof the defendants say that the plaintiff ought not to be admitted to say that the injuries and damage and death alleged (which are not admitted) were solely caused by the negligence or carelessness of the defendants or their servant or agent or that the said Ellen Marginson was not his servant or agent or to allege that the negligence of the said

deceased did not contribute to the said collision, and that such negligence of the said deceased did not contribute to the alleged injuries and death to the extent of one-half and the present proceedings are founded upon the same circumstances as the said proceedings in the said county court and the defendants will contend that the plaintiff is estopped from bringing these proceedings and from making any of the claims made in these proceedings and from recovering damages on his own behalf or at all.

I have read from what is set out in the pleadings. The matter came A before me. The only evidence I had was the file of the county court proceedings, which did not include anything but the formal judgment of the county court judge. I was handed up a copy of the transcript of the shorthand notes of his judgment, which was objected to as not forming part of the records, and I have not looked at it. The objection B is taken that the plaintiff is estopped from bringing this action. It is quite clear, I think, that, although the doctrine of *res judicata* is a doctrine designed to put an end to litigation, that doctrine cannot be invoked unless the matter which has been adjudicated upon is a matter between the same parties suing in the same right. That would seem to be the C general principle laid down in a great many cases, and in particular in the case of *Re May* (1), *Henderson* v. *Henderson* (2), and *Hoystead* v. *Taxation Comr.* (3).

I think that the difficulty in this case, as in all the other cases—there are large numbers in which the doctrine has been discussed—is that D which was stated by so great a judge as Lindley, L.J., in *Priestman* v. *Thomas* (4), where, agreeing with the other members of the court, he says, at p. 215:

> It appears to me that the principle established in the *Duchess of Kingston's Case* (5) is clear enough, but the difficulty lies in applying it to each particular case. E

I have had some difficulty in applying the principle to the facts of this particular case, but I think that I have done so correctly.

The defendants rely, as I say, on a great number of cases, and, among others, on *Green* v. *Weatherill* (6). They relied upon that case as an authority for the proposition that the plaintiff in an action could not go F behind the judgment of an action for practically the same facts. That case was decided by Maugham, J. It was said by Mr. Clothier that, although it might be said, with truth, that the question of the injuries to the plaintiff had never been litigated, that the question as to the right to recover in respect to the death of the wife, both under the Fatal G Accidents Act and under the Law Reform Act, had never been litigated, the actions are brought on practically the same facts as were the actions in the county court. It is to be remembered that the original action in the county court was not between the same parties. That action was started by three persons who claimed damages to their premises, as I H understand it. It had nothing whatever to do with either the defendants or the plaintiffs in this case. The litigation there was to assess, to find out, whether or not the plaintiff and the defendant in this action, and which of them, if any, were liable to an entirely different person. So the original action in the county court was not between these parties before me at all. The difficulty which has been created, I think, has been so created by the fact that there were third-party proceedings arising out of the original action; and those third-party proceedings were proceedings directly between these two persons. Mr. Clothier said that, although it might be true that the original action in the county court was not between the same parties, this action—namely, the High Court action which is before me—is on identically the same facts, and therefore *Green* v. *Weatherill* (6) lays down that a plaintiff in an action cannot go behind a judgment in an action on practically the same facts.

Another case upon which reliance was placed was a case to which I have already referred, *Hoystead* v. *Taxation Comr.* (3). The headnote of that case reads as follows:

> Under a will the annual income from an estate in Australia was divisible by the trustees between the testator's daughters. The trustees objected to an assessment for the financial year 1918-1919 under the Land Tax Assessment Act, 1910-1916, of Australia; they claimed under sect. 38 (7) of the Act a deduction of £5,000 in respect of the share of each daughter. A case was stated for the opinion of the Full Court of the High Court upon the questions: (i) whether the shares of the joint owners, or of any and which of them, in the land were original shares within sect. 38; (ii) how many deductions of £5,000 the respondent should make. The Full Court answered these questions as follows: (i) the shares of the six children surviving at the date of the assessment; (ii) six. Judgment upon the objection was entered accordingly. Upon the assessment for 1919-20, the commissioner allowed only one deduction of £5,000, contending that the beneficiaries were not joint owners within the meaning of the Act. Upon a case stated the Full Court upheld that view, and held that the commissioner was not estopped by the previous decision:—HELD: that the commissioner was estopped, since although in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. Judgment of the High Court reversed.

In the course of that case LORD SHAW gave a very full opinion. I would refer to the passage beginning at p. 165:

> Very numerous authorities were referred to. In the opinion of their lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view to obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs. . . In *Outram* v. *Morewood* (7), an action of trespass over a certain vein of coals lying under the close of the plaintiff, it was held that if a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies in respect of the same fact or title.
>
> In a previous action an issue was found for the plaintiff and against the wife, one of the two subsequent defendants, her husband being the other defendant with her in the action under decision. LORD ELLENBOROUGH, C.J., said, at pp. 353-355: "The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel

> and precluded from averring the contrary of what was then so found, the husband in respect of his privity, either in estate, or in law, would be equally bound. . . .
> It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery in an action of trespass of itself is only a bar to the future recovery of damages for the same injury : but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." A

LORD SHAW discusses the principle, and, in a later passage at p. 170, he cites with approval the case of *Henderson* v. *Henderson* (2), to which reference had already been made, and quotes as follows :

> "The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." This authority has been frequently referred to and followed, and is settled law. B

I cite these two cases because they were the two cases which were C typical, and upon which Mr. Clothier relied. At first sight, upon these authorities, it would look as though, in the present case, it having been found in the county court that both the parties, the plaintiff and the defendant, were equally to blame for the damage which was done to the house or premises of those three plaintiffs. I ought to say that D the plaintiff and the defendant cannot again indulge in litigation which involves the retrial of a question as to whether or not those two persons, the plaintiff and the defendant, are not equally liable for the accident which gave rise to the damage, not only to the premises of those three persons, but also to the plaintiff himself, and to his wife. E

I think that the true answer, in this case, is to be found in the cases which were relied upon by Mr. Gorman—that of *Brunsden* v. *Humphrey* (8) (particularly the judgment of BOWEN, L.J.), and that of *Leggott* v. *Great Northern Ry. Co.* (9). I think, on the whole, that I should be wrong if, on the scanty information before me, I were to stop this action— F scanty information, not through anybody's fault, because, after all, when one is trying the point one has to take the pleadings as they stand, coupled with the matter which may be referred to in the pleadings, and the record of the county court. I have seen the judgment both in the original action in the county court and the third-party proceedings, and G I know no more than that. I think that I should be wrong if, on that information, I were to stop this action by holding that the plaintiff is estopped, and I do not propose to do so. I think that the actual question in this present action has never been decided as between the parties to this action : i.e., whether or not the injury to the plaintiff H himself was caused by the negligence of the defendants, or whether the death of the wife was due to the negligence of the defendants. Where that question has not been decided, and where the plaintiff is suing in at least two different capacities—he has never been sued, I understand ; no question has ever been decided between him and the defendants in his capacity of administrator—I think that I should be wrong in holding that, on the facts and in the circumstances of these cases, as I know them, the plea of the defendants that the plaintiff should be estopped is sound. Therefore, I decide this point in favour of the plaintiff.

Solicitors: *Henry Backhouse & Son*, Blackburn (for the plaintiff);
A *Oddie & Roebuck*, Blackburn (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

Disapproved. MET. BORO' OF BATTERSEA'S CASE. [1949] 1 K. B. 434

WESTMINSTER CITY COUNCIL *v.* ROYAL UNITED SERVICE INSTITUTION.

B

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **April 29, 1938.**]

Rating—Institution incorporated for "promotion and advancement of naval and military science and literature"—Supported by Government grant and
C *members' subscriptions—Whether instituted for the "purposes of science, literature or the fine arts exclusively," and supported by voluntary contributions, so as to be exempt from rating—Scientific Societies Act,* 1843 (*c.* 36), *s.* 1.

The Scientific Societies Act, 1843, s. 1, provides for the exemption from rates of "any society instituted for purposes of science, literature,
D or the fine arts exclusively," if "supported wholly or in part by annual voluntary contributions." An institution, established in 1831 and incorporated by Royal Charter in 1860 for the purposes of "the promotion and advancement of naval and military science and literature," was rated as occupier of a hereditament used for carrying into effect its purposes. The institution was supported by an annual Government grant and by members' subscriptions. The activities of the institution
E were carried out by having a library, a reading-room and lectures, by publishing a journal and by possessing and maintaining a museum. Exemption from rates was claimed under sect. 1 of the Act of 1843, but the rating authority contended that the said hereditament was not used for the purposes of science or literature exclusively, that the reading-room, lecture theatre and museum were not used exclusively for the
F said purposes, that the said hereditament was mainly used for the purposes of naval and military professional art, which were not purposes of science or literature, and that the institution was not supported by voluntary annual contributions:—

HELD: (i) the words "science and literature" within the meaning of the Scientific Societies Act, 1843, s. 1, included naval and military science and literature.

G (ii) the modes in which the institution carried out its activities were only modes in which the exclusive purposes of science and literature were carried out.

(iii) the annual Government grant was a voluntary contribution within the meaning of sect. 1 of the Act of 1843.

[EDITORIAL NOTE. The carrying on of a business usually requires the doing of
H certain matters which are merely ancillary to the business. It follows, therefore, that the carrying on of an institution for the purposes of science, literature, or the fine arts, exclusively, may include the performance of certain ancillary matters, and such performance will not prevent an institution from being included within the meaning of the words.

AS TO THIS EXEMPTION, see HALSBURY, Hailsham Edn., Vol. 27, p. 377, para. 807; and FOR CASES, see DIGEST, Vol. 38, pp. 493-499, Nos. 485-540.]

Cases referred to:

(1) *R.* v. *Cockburn* (1852), 16 Q.B. 480; 38 Digest 495, *495*; 18 L.T.O.S. 302; *sub nom. R.* v. *St. Martin-in-the-Fields (Churchwardens & Overseers)*, 21 L.J.M.C. 53.

(2) *Purvis* v. *Traill* (1849), 3 Exch. 344; 38 Digest 497, *509*; 18 L.J.M.C. 57; 12 L.T.O.S. 379.

(3) *Hornsey School of Art* v. *Edmonton Union* (1905), 94 L.T. 203; 38 Digest 498, *524*.

(4) *British Non-Ferrous Metals Research Association* v. *St. Pancras Borough* (1932), 16 Rating and Income Tax Cases 149.

(5) *Liverpool Corpn.* v. *West Derby Union* (1905), 92 L.T. 467; 38 Digest 494, *494*.

Appeal by way of special case stated by the quarter sessions for the county of London. The facts and the arguments are fully stated in the judgments. The institution here in question was founded in 1831 under the name of the Naval and Military Library and Museum. In 1832 its name was changed to the United Service Institution, and its constitution embodied in a deed of declaration of trust. On Feb. 22, 1860, it was incorporated by Royal charter.

A. S. Comyns Carr, K.C., and *J. Scott Henderson* for the Westminster City Council.

R. M. Montgomery, K.C., and *Michael E. Rowe* for the Royal United Service Institution.

Lord Hewart, L.C.J.: This is a special case stated by the quarter sessions of the peace for the county of London. The controversy arose in the following way. In a rate made on Apr. 1, 1937, by the respondents, the Westminster City Council, the appellant institution, the Royal United Service Institution, was rated as occupier of a certain hereditament described as:

> Whitehall Museum, formerly known as "the banqueting hall" and institution and offices on the southern side thereof [at a rateable value of £1,247].

The institution gave notice of appeal to quarter sessions, on the ground that the institution was not liable to be rated by virtue of the Scientific Societies Act, 1843. On June 13, 1937, quarter sessions heard and determined that appeal, and allowed it, agreeing, however, to state a case for the opinion of this court.

It is not necessary to reiterate the facts of this case, which have been read. With reference to one of the points raised, however, it may be well to mention that the total income of the institution for 1936 was £9,826, of which it is found that £670 was contributed by the Government by way of annual grant.

The contentions of the appellants, which were accepted by the court of quarter sessions, were as follow:

> That "science and literature," within the meaning of the Scientific Societies Act, 1843, s. 1, included naval and military science and literature; (2) that the appellant institution was instituted for the purposes of such science and literature exclusively; (3) that the said hereditament was occupied by the appellant institution exclusively for the transaction of its business and for carrying into effect its purposes; (4) that

> the appellant institution was supported in part by annual voluntary contributions —namely, the said Government grant and/or members' subscriptions.

The main contention on the part of the respondents, whose appeal this is, was

> that the said hereditament was not used for the purposes of science or literature exclusively. A

The case manifestly depends upon the provisions of the Scientific Societies Act, 1843, s. 1, by which section it is provided :

> No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in B respect of any land, houses, or buildings, or parts of houses, or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members. . . .

C Then there is a further proviso as to obtaining a certificate. The important words are clearly the words "instituted for purposes of science, literature, or the fine arts exclusively."

This institution, now called the Royal United Service Institution, was established in 1831. It has a charter of incorporation, which was granted D in 1860. The charter uses the words : "the promotion and advancement of naval and military science and literature." It contains these words :

> That such society [the antecedent society under the title of "the Naval and Military Library and Museum"], has sedulously encouraged and extended naval and military science and literature ; and it would further tend to the promotion and advancement of naval and military science and literature if we granted to [the E said Duke of Northumberland and the members of the said society] our Royal charter of incorporation.

The following is now added under the heading, "The Purposes : How Effected" :

> The library contains scientific, professional, historical and other works. The F museum contains objects illustrative of the progress of naval, military and air force events and inventions connected with the fighting services. Lectures on professional and other subjects are read in the theatre and may be followed by discussions.

There is also mention of a journal, which is published periodically.

The argument before us has turned mainly upon the case of *R.* v. G *Cockburn* (1). Indeed, it was contended in argument that the decision of that case in the Queen's Bench in 1852 was conclusive and binding upon this court in the present case. That contention seems to me to be based on more than one misapprehension. When *R.* v. *Cockburn* (1) was argued in 1851, the charter of this institution had not yet been H brought into existence. The United Service Institution at that time, having been founded in Mar., 1832, rested upon a deed of declaration of trust, dated Mar. 17, 1832. That deed of trust set out the purposes for which the institution had been brought into existence. It leaps to the eye, when one looks at this report in the Queen's Bench, that there was not merely a slight difference, but a profound difference between the provisions of that deed of trust and the terms of the existing charter of incorporation. In particular, as LORD CAMPBELL, C.J., said, at p. 490 :

> We are bound to look to all the purposes for which the society is professedly founded, and to which, without a breach of trust, its funds may be applied. The chief of these is "professional art."

When one looks at the charter of incorporation of the institution, it is A manifest that those words have disappeared. It is no longer true to say that the chief of the purposes for which this institution is professedly founded is "professional art." Nor is it merely a matter of words, because LORD CAMPBELL, C.J., went on to say at p. 490 :

B

> The statute enumerates only "science, literature," and "the fine arts." Therefore, anything which comes within the category of art and is not one of the fine arts, seems to be excluded. If "professional art" is meant to embrace a training for all professions, no one can contend that it is necessarily confined to science. But, supposing that it applies only (as the counsel for the appellants contend) to the Army and Navy, these professions, while they are conversant with science, require an acquaintance with various subjects which cannot be considered scientific, and which cannot be considered ancillary to science. C

A little later, LORD CAMPBELL, C.J., added, at p. 491 :

> We do not think that the construction of the appellants can be put upon the statute without disregarding the word "exclusively," which it has anxiously introduced both into the preamble and the enactment.

D

LORD CAMPBELL, C.J., added, at p. 492 :

> The case of *Purvis* v. *Traill* (2) established the principle that, if the society may use the building rated for any other purpose than the purposes of science, literature and the fine arts, the exemption cannot be claimed. Consistently with the deed of settlement in this case and with the rules and regulations, the building rated, and the funds of the society, may be applied to purposes different from those of E science, literature, or the fine arts.

How does this case stand in relation to those words ? That which is to receive the protection of this exempting provision is any society "instituted for the purposes of science, literature, or the fine arts exclusively." One cannot read those words without being impressed by F their comprehensive generality—"science, literature, or the fine arts." There follows, indeed, the word "exclusively," which, for the present purposes, is not really important.

The argument which has been presented on behalf of the appellants here (the respondents below) not merely lays stress upon the word G "exclusively" but also proceeds upon what I can only regard as an arbitrary and imperfect definition or description of the terms contained in the words "science, literature, or the fine arts." Indeed, I do not put the matter too emphatically if I say that the basis of the argument presented to this court is that the term "science" in this first section of H the Act of Parliament means "physical science." Indeed, there were moments when it seemed to be in the course of being limited to organic or inorganic chemistry, with perhaps a reference to theoretical mechanics thrown in. I cannot find any such limitation in the words in the section "science, literature, or the fine arts exclusively."

What is the force of that word "exclusively"? That, I think, is made abundantly plain by the words which I have just cited from the judgment of LORD CAMPBELL, C.J., in *R.* v. *Cockburn* (1). If the society may use the building rated for any purposes other than those of science, literature and the fine arts, the exemption cannot be claimed. However, there is no suggestion in this case that this hereditament is, or is sought to be, used for any purposes other than those of "science, literature, or the fine arts." The obligation involved in the word "exclusively" is faithfully performed.

What is said, however, is that the term "science" is misinterpreted so as to include "naval and military science." Why should it not include that? What is there in this Act of Parliament which excludes naval and military science, any more than literature is excluded? Really, the argument for the respondents, the present appellants, seems to me never to get beyond the contention that, on the true interpretation of sect. 1 of this statute, "science" must be strictly limited to what is spoken of or what is popularly known as, "physical science." When once it is seen that no such circumscribed interpretation is involved in the clear terms of this section, I think that the substratum of the argument is gone, and that there is left room for the contentions so clearly raised, and so fully accepted in the court below. In my opinion, the appellants in the court below were right in contending, and the Court of Quarter Sessions was right in holding, that "science and literature" within the meaning of this statute included naval and military science and literature, and that there is nothing found or suggested in this case which contradicts the proposition that the appellant institution was instituted for the purposes of such science and literature exclusively.

It is quite clear, however, when one looks at the judgment delivered by the Court of Quarter Sessions, that the true question was formulated and dealt with. The chairman said this:

> The material question is: Is naval and military science and literature within the exemption of the Act of 1843, as being for the purposes of the society instituted for the purposes of science, literature, and the fine arts exclusively?

He said also that the relevant authorities had been cited and considered,

> . . . and the conclusion the court arrives at is that this naval and military science and literature is within the expressions used in the Act of Parliament.

He added, having regard to certain modes in which the society carries on its activities:

> We have come to the conclusion that those are only modes in which the exclusive purposes of science and literature are carried out, and are not too wide to deprive the institution of its exemption.

I repeat that there were no materials before the court upon which the proposition could accurately be formulated that there was any purpose here going outside of the purposes of "science, literature or the fine arts." In other words, those were the purposes for which exclusively the society was instituted, and for which exclusively it continued to exist.

Reference has been made in the course of the argument to various cases, but in my opinion they do not in the least disturb the conclusion at which the Court of Quarter Sessions arrived.

With regard to the subsidiary question—namely, whether that part of sect. 1 of the statute of 1843 which required that the society to be exempted " shall be supported wholly or in part by annual voluntary contributions " is satisfied—it seems to me that, on the facts which are found—namely, that £670 out of £9,826 was contributed by the Government by way of annual grant—that must be taken as concluding that matter, since the decision of this court in *Hornsey School of Art* v. *Edmonton Union* (3), followed as it was more recently still (in 1932) by *British Non-Ferrous Metals Research Association* v. *St. Pancras Borough* (4). I think, therefore, that, in all respects, the decision at which the Court of Quarter Sessions arrived was correct, and that this appeal by the respondents from that decision ought to be dismissed.

BRANSON, J.: I agree entirely with what has fallen from LORD HEWART, L.C.J., but, as it may be that this case may go further, I think, perhaps, that it would be right for me to express my reasons in my own words.

The history begins with the formation of the predecessor of the present institution under a trust deed in 1831. It received its name of the United Service Institution later. Under the trust deed, the reason for its existence was described as being, in the first place, the forwarding of professional art. In those circumstances, the question arose as to whether or not that institution was entitled to the exemption from rating which was given by the Scientific Societies Act, 1843. That question came before this court in *R.* v. *Cockburn* (1), and, as I understand the judgment of LORD CAMPBELL, C.J., it proceeded upon the following basis. Having pointed out that, in order to be exempt under the statute, the society must be one instituted " for the purposes of science, literature, or the fine arts exclusively," the court then proceeded to consider whether or not this society fell within that category. LORD CAMPBELL, C.J., attacked that problem by asking what it was which the society was, by its constitution under the trust deed, empowered to do. Construing the words " professional art," he came to the conclusion that those words entitled the society to undertake the teaching of people to exercise the professional art of a soldier. He also held—and, with great respect, I think that he correctly held—that the teaching of people to exercise the professional art of a soldier was not a purpose of science, within the meaning of the language used in the Scientific Societies Act. So far as I am able to follow, that is the whole decision in *R.* v. *Cockburn* (1).

In 1860, the present institution was formed by Royal charter. Under that Royal charter the purposes for which the society is instituted are described as being " the promotion and advancement of naval and military science and literature." The question is whether or not, in the

language of the Act, this is a society instituted "for the purposes of science, literature, or the fine arts exclusively." Taking the terms of the Royal charter, I am of opinion that the language of the charter brings it within the language of the statute. I cannot see that "naval and military science and literature" are not covered by the words
A "science, literature, or the fine arts." Why should "science" be cut down so as to exclude "naval science," or "literature" be limited so as to exclude naval or military literature?

Unless it can be shown that, in the conduct of its business, or in the exercise of its activities, this institution has departed from the purposes
B for which it was instituted, it comes within the exemption provided by the Act. All that has been said, as I have followed the argument, is that one can point to articles appearing in the society's journals, and to periodicals lying upon the society's table, which cannot be said to be germane either to naval or to military science, or to any sort of science at
C all, and that, for that reason, it can be said that the society does not fall within the protection of the exemption in the section.

In order to sustain that argument, reference is again made to the judgment of LORD CAMPBELL, C.J., in *Cockburn's* case (1). As I have already said, however, it does not seem to me that LORD CAMPBELL, C.J., was in
D any sense directing his mind to the point which it is now said that he decided in the *Cockburn* case (1). In my view, the *Cockburn* case (1) is no authority at all in the present case, because it was dealing with different language and different circumstances altogether. For these reasons, I think that, upon the facts found in the special case, this society is a
E society instituted exclusively "for the purposes of science or literature"—I do not think it is suggested here that "the fine arts" come into the matter at all.

With regard to the second point, which is that the society fails to bring itself within sect. 1 of the Scientific Societies Act, by reason of the fact
F that it is not supported wholly or in part by annual voluntary subscriptions, we have been invited to say that there are in the reported cases two different lines of decision. It is said that KENNEDY, J., in *Liverpool Corporation* v. *West Derby Union* (5), decided that a subscription such as the subscription by the Government to the funds of this society
G could not properly be called a subscription within the Scientific Societies Act. KENNEDY, J., it is true, did use language as follows. He said at p. 470:

> It seems to me to call the latter a voluntary contribution is to do violence to the ordinary meaning of language which has an ordinary accepted meaning . . .

H However, RIDLEY, J., who was the other member of the court, having agreed with him in that judgment which he was pronouncing—which, by the way, was not based entirely upon the absence of voluntary subscriptions, but also upon the difficulty of treating the committee of a corporation which was maintaining a library as a society instituted for any purposes whatsoever—when delivering his judgment in *Hornsey School* *of Art* v. *Edmonton Union* (3), explained at p. 207, what he thought the court, of which he was a member, was intending to decide in *Liverpool Corporation* v. *West Derby Union* (5), namely, that the contribution of £250 was nothing more than the corporation paying that money to itself, and, therefore, it could not be held to be a voluntary contribution. A

However that may be, the clear decision of this court in *Hornsey School of Art* v. *Edmonton Union* (3), followed, as it was, by the decision of this court in 1932, in *British Non-Ferrous Metals Research Association* v. *St. Pancras Borough* (4), makes it impossible for us to come to any conclusion other than that the Government contribution is, within the B meaning of the Scientific Societies Act, a voluntary contribution, and, therefore, sufficient to bring this society within the Scientific Societies Act.

HUMPHREYS, J.: I also agree that this case is not covered by the C authority of *R.* v. *Cockburn* (1), for the reasons expressed by the other members of the court.

It appears to me that the building occupied by the United Service Institution is clearly (and I think almost, if not quite, admittedly) used under the terms of the charter purely for the purposes of science and D literature, the branch of science and literature concerned being naval and military science and literature.

The question which appears to me really to be raised in the argument of Mr. Comyns Carr here arises from the use of the word "exclusively" in the section which has to be construed by the court, the section which E exempts from rating a building belonging to a society "instituted for the purposes of science, literature, or the fine arts exclusively," which building also must be occupied by it for the transaction of its business, and for carrying into effect its purposes. As I understand the main argument of Mr. Comyns Carr, it is this. While it may be true that to some extent F this building is used for the purposes of science and literature—"the fine arts" do not come into this matter—it cannot be said to be so used exclusively by reason of the matters to which he has drawn our attention. There may be—and, for my own part, I think that there must be—many things done in the course of the carrying on of such an institution as the G United Service Institution which cannot be said to be directly done for the purposes of science and literature. Quite apart from that, however, and without invoking the aid of the doctrine *de minimis non curat lex*, I do not think myself that the building can be described as any the less exclusively used for the purposes of science and literature because there H are certain matters which have to be done and carried on in that building which are merely ancillary to the carrying on of a business for that purpose. I think that the important words in this section are the words "for the purposes of."

I have followed with interest Mr. Comyns Carr's very clear and interesting argument, and I have with him gone through the list of lectures and the titles of some of the publications which are to be found in this institution. All I can say is that, having looked through that list and those titles, I am not prepared to say that quarter sessions were wrong in holding, as they did, that the purposes for which this building is occupied and used are those stated in the charter—that is, for "the promotion and advancement of naval and military science and literature," and for no other purposes. Upon the other point, the question of voluntary contributions, I have nothing to add to what has already been said by the other members of the court.

Appeal dismissed with costs. Leave to appeal on condition that appellants pay costs of both parties if case taken further.

Solicitors: *Allen & Son* (for the Westminster City Council); *Harrington, Noble & Co.* (for the Royal United Service Institution).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re HORLICK'S SETTLEMENT TRUSTS, COLLEDGE *v.* HORLICK.

[CHANCERY DIVISION (Farwell, J.), **April 1, 26, May 2, 1938.]**

Rentcharges and Annuities—Free of tax—"And of every other tax on income for the time being in force"—Sur-tax—Amount of sur-tax to be provided.

By a settlement made in consequence of a divorce, the settlor covenanted that he or his personal representatives would pay to trustees in trust to pay to his divorced wife annually "such sum as after deduction of income tax at the standard rate for the time being in force and of every other tax on income for the time being in force shall leave a clear sum of £4,000." The lady had subsequently remarried, and the settlor died:—

HELD: the executors of the settlor were bound to provide a sum sufficient to discharge the income tax in respect of the annuity and such proportion of the total sur-tax payable by the annuitant as the sums upon which she is from time to time assessed to sur-tax in respect of the said annuity bear to the total amount of the assessment of the joint income of the annuitant and her husband for the purpose of sur-tax.

[EDITORIAL NOTE. No question here turns upon the provision of the income tax. The question is whether the words used in the settlement render the settlor and his personal representatives liable to pay any and, if so, what sum in respect of sur-tax. As to this, it has been held that the words are sufficient to include sur-tax and the amount must be the actual amount of sur-tax charged in respect of the annuity, however that charge may be increased by other income of the annuitant or of her husband.

AS TO SUR-TAX ON ANNUITIES, see HALSBURY, Supp., Rentcharges, para. 974; and FOR CASES, see DIGEST, Vol. 39, p. 168, Nos. 588-592.]

ORIGINATING SUMMONS as to provision of sur-tax in respect of an annuity payable under a settlement. The terms of the summons and the facts are set out in the judgment.

Roger Turnbull for the trustees of the settlement.

F. R. Evershed, K.C., and *A. C. Nesbitt* for the executors of the estate.

C. R. R. Romer, K.C., and *R. Cozens Hardy Horne* for Lady Oppenheimer.

FARWELL, J.: This summons raises a question of construction on the settlement dated Aug. 19, 1930, made between the late Sir Ernest Burford Horlick and the lady who was then his wife and who is now Lady Jane Oppenheimer and John Theodore Colledge, Admiral Sir Edward Henry Fitzhardinge Heaton Ellis, James Sidney Mason and Henry Edward Lyons.

The circumstances which give rise to this question are these. On Apr. 23, 1929, a decree *nisi* for the dissolution of the marriage of Sir Ernest Horlick and Lady Horlick (now Lady Oppenheimer) was, on the petition of Lady Horlick, pronounced by the Divorce Court, and the decree absolute was made on Aug. 20, 1930. In the interval between those two dates, this settlement was made. On Sept. 2, 1931, Lady Horlick married again, and became Lady Oppenheimer. On Oct. 7, 1934, Sir Ernest Horlick died, and the question which is now raised on this summons is one which affects the executors of Sir Ernest Horlick, who are parties to the summons.

The settlement is dated Aug. 19, 1930, and I have already read the parties. It recites that a decree *nisi* has been obtained. It recites a realty settlement to which I need not refer, certain furniture settlements, and certain other facts which are not relevant to anything I have to consider beyond this, that it recites that:

> the investments belonging to the settlor [Sir Ernest Horlick] which are respectively specified in the first and second schedules hereto are intended to be transferred into the names of the trustees to the intent that the same respectively shall be held upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same respectively.

Then there are other recitals to which I need not refer, and then there is a recital:

> that all claims by the settlor in respect of the moneys so advanced by him to [certain people] shall be released and (*d*) that such other provisions shall be made for the benefit of Lady Horlick and Peter Horlick and Elizabeth Ann Horlick (the daughter of the settlor and Lady Horlick and hereinafter called Elizabeth Horlick) as are hereinafter expressed.

Then the operative part of the deed provides that:

> The settlor or his personal representatives will in every year during the remainder of the life of Lady Horlick pay to the trustees in trust for Lady Horlick such a sum as after deduction of income tax at the standard rate for the time being in force and of every other tax on income for the time being in force shall leave a clear sum of £4,000 and on the death of the survivor of the settlor and Lady Horlick the settlor's personal representatives will pay the said yearly sum to Peter Horlick and Elizabeth Horlick during their lives in equal shares if they shall both be living at the date of the death of the survivor of the settlor and Lady Horlick and if only one of them Peter Horlick and Elizabeth Horlick shall then be living then to such one of them during his or her life. (*b*) The said yearly sum shall be paid in advance by equal quarterly payments on the usual quarter days the first payment to be made on the first quarter day after the said decree has been made absolute but no allowance or return of money shall be made in respect of anything

> which may have been once paid under this present clause if the said yearly sum shall cease on any day other than one of the said quarter days. (*c*) For the purpose of better securing the payment of the said annual sum of £4,000 as aforesaid the trustees shall stand possessed of the investments specified in the first schedule hereto and intended to be transferred to them as aforesaid upon trust if and so often as default shall be made in payment of such annual sum by the settlor or his representatives out of the income thereof and of the property for the time being representing the same and if such income shall be insufficient then by sale but only with the consent of such parties (other than the settlor) as may be necessary owing to the constitution of the company of a competent part of the capital thereof to raise and pay the said annual sum and subject as aforesaid shall hold the said investments upon trust for the settlor.

Clause (*d*) provides for certain reorganisation and reconstruction of the company, and I do not think that it is necessary for me to deal with that. Clauses (*e*) and (*f*) provide :

> The settlor and his legal personal representatives shall have power at any time during the lifetime of Lady Horlick Peter Horlick and Elizabeth Horlick or of the survivors or survivor of them to pay to the trustees such a capital sum as will at the time of such payment produce by its income after the deduction of income tax and such other taxes on income as aforesaid the clear annual sum of £4,000 and in that event the trustees shall forthwith transfer the investments specified in the first schedule hereto or the investments cash and securities representing the same to the settlor or as he shall direct. (*f*) The trustees shall stand possessed of such capital sum upon trust to invest the same with the consent of the settlor during his life and after his death at the discretion of the trustees in or upon any of the investments hereinafter authorised with power with such consent or at such discretion as aforesaid to vary the same for others of a like nature and to hold such investments upon trust if default shall be made as aforesaid out of the income thereof and if such income shall be insufficient then by a sale of a competent part of the capital thereof to raise and pay the said annual sum and subject as aforesaid upon trust for the settlor.

Then there is a provision that the settlor or his personal representatives will, during the remainder of the life of Lady Horlick, and so long as certain freehold properties remain unsold, pay and discharge all rents, duties, assessments and outgoings payable in respect of certain property, and, in the event of the property being sold :

> the settlor or his representatives will during the remainder of the life of Lady Horlick pay and discharge (up to a total annual sum of £300) all such rates taxes duties charges assessments and outgoings as aforesaid as shall be payable in respect of any other dwelling-house in which Lady Horlick shall for the time being be residing.

I think that there is nothing else in the settlement to which I need refer.

It is obvious that the object of that settlement was to provide means for Lady Horlick, as she then was. Sir Ernest Horlick was a man of considerable means, and Lady Horlick had an income of under £400 a year of her own, but no other resources, and it is plain that the settlement was a settlement for the purpose of making provision for her.

After that settlement had been made, Sir Ernest Horlick paid the annuity of £4,000 a year, and paid the income tax and sur-tax which Lady Horlick had to pay down to the date of her remarriage, but, after her remarriage, which, of course, affected the rate of sur-tax payable, and made the tax which the lady had to pay larger than it was before, Lady Oppenheimer and Sir Ernest Horlick made an arrangement between themselves that Sir Ernest Horlick would pay the sur-tax on the footing that the £4,000 a year and the other small income which the lady had was the whole of her income as though she were a *feme sole.*

Since the death of Sir Ernest Horlick, the lady has not been willing to continue that arrangement. It was an arrangement which was not suggested to be other than a personal arrangement between Sir Ernest Horlick and the lady, and she has called upon the trustees to pay to her in each year, not only the income tax which she has to pay on the £4,000 annuity, but also the sur-tax which she is called upon to pay, she being assessed separately from her husband.

The question, therefore, is whether the executors of Sir Ernest Horlick are not only liable to provide the £4,000 a year, and the income tax on £4,000 a year, but are also under an obligation to pay to Lady Oppenheimer the sum which she has to pay to the revenue for sur-tax on her income.

That question having arisen, and the parties not being agreed upon it, this summons was taken out. The summons, as taken out, raised those questions, and those questions only. Neither Mr. Peter Horlick nor the daughter is made a party to the summons, and therefore any questions which may arise as to what their rights may be hereafter, if they both survive, or either of them survives, the mother, are not matters for my consideration except in so far as they are relevant to the actual question I have to decide, and I ought to say that any question of that kind is one which can only properly be dealt with in their presence. The summons, as taken out, is taken out by the trustees of the settlement, and makes the executors of Sir Ernest Horlick and Lady Oppenheimer defendants. What the summons as amended asks is that it may be determined:

> whether, upon the true construction of the said settlement, and in particular of cl. 1 (*a*) thereof, whereby it was agreed and declared that the settlor or his personal representatives would in every year during the remainder of the life of 'Lady Oppenheimer pay to the plaintiffs in trust for Lady Oppenheimer such a sum as, after deduction of income tax at the standard rate for the time being in force and of every other tax on income for the time being in force, shall leave a clear sum of £4,000, and, in the event which happened of the remarriage on Sept. 2, 1931, of Lady Oppenheimer to the said Sir Francis Oppenheimer, the executors as from the date of the death of the settlor are liable to pay or provide any sum in respect of sur-tax for (i) such proportion of the total sur-tax payable by Lady Oppenheimer as the sums upon which she is from time to time assessed to sur-tax in respect of the said annuity bear to the total amount of the assessment of the joint income of Sir Francis Oppenheimer and Lady Oppenheimer for the purpose of sur-tax; or (ii) such proportion of the total sur-tax which would be payable by Lady Oppenheimer (if such sur-tax were assessed upon her without regard to the income of Sir Francis Oppenheimer) as the sums upon which she is from time to time assessed to sur-tax in respect of the said annuity bear to the total sums upon which she would be assessed for sur-tax without regard to the income of Sir Francis Oppenheimer; or (iii) some other, and, if so, what, proportion of the sur-tax payable by Lady Oppenheimer.

The first question with which I will deal is the question whether any sur-tax is payable at all. During the course of the argument, I was referred to several authorities, but I doubt whether any of them assist me very much on this question, because it is, in my judgment, purely a question of the construction of this particular document. By that

I mean, of course, that it is a question of the intention of the parties, as disclosed by the language which they have used in the document, and none of the cases to which I have been referred, or the words which had to be construed, is the same as that which I have to consider here. One does start with this, however, that *prima facie* sur-tax is income tax. That is to say, where there is a gift by will, for instance, of an annuity free of income tax, the annuitant is entitled to have income tax provided for, and sur-tax as well. Sur-tax must be treated, therefore, as income tax, although it is not a similar tax in all respects, in that the method of assessment differs from that of income tax, strictly speaking, and, moreover, there are no provisions for deduction of sur-tax from the sum paid, as is the case in income tax strictly so called. That is necessarily so by reason of the nature of sur-tax, which is a tax, not on current income, but on the income of the preceding year, and is payable by the person assessed on and after Jan. 1 in each succeeding year.

In those circumstances, I have to look at this document and see what was the intention of the parties. If the parties intended that Lady Horlick was to receive in each year not only the amount of income tax on the £4,000, but also sur-tax, the document appears to me to be unhappily worded. Looking at it, it would seem that there are several indications in the document which point in the direction of the conclusion that sur-tax was not intended to be included. One starts with this, that the sum to be paid to Lady Oppenheimer is " such a sum as after deduction of income tax." The phrase " deduction of income tax " is not very apt, or apt at all, when one is dealing with sur-tax, because there is no question of deducting anything except income tax, and, if the intention was to provide that the lady was to have £4,000 plus the sum which otherwise the trustees would be entitled to deduct for income tax, that would seem to be appropriate language for making such provision. When one comes to the gift to Peter Horlick and Elizabeth Horlick after the death of Lady Oppenheimer, the provision for them is more apt, and the amount is more easily ascertained in each case, whether they are both alive or one only is alive, if income tax is the only payment to be made to Lady Oppenheimer in addition to the annuity to which she is entitled. Further, there is the provision that the yearly sum shall be paid in advance in equal quarterly payments on the usual quarter days; and there is the provision in cl. (*e*) giving Sir Ernest Horlick or his legal personal representatives the right to exchange the securities which are deposited with the trustees for other securities. In regard to that, it should be noticed that that clause in no way relieves either Sir Ernest Horlick or his executors from a personal liability to pay the annuity. It is not a provision under which Sir Ernest Horlick or his personal representatives can deposit or put securities into the hands of trustees, and thus relieve himself or themselves of the burden of the annuity. The personal liability continues, and cl. (*e*) is only directed to the purpose of enabling Sir Ernest Horlick or his personal representatives to exchange those securities which are deposited for other securities.

Looking at the settlement, so far as I have examined it, the indications to my mind are in favour of the view that income tax, strictly speaking, and not including sur-tax, is what the parties had in contemplation.

I cannot ignore the fact that there are other words in the settlement to which I have not yet referred, and those words are " and of every other tax on income for the time being in force." Those words are repeated in cl. (*e*) : " such other taxes on income as aforesaid." In construing this document, I am bound to read the whole of the document, and to give effect, if I can, to every part of it. I am not entitled to disregard any part of the document because it would seem that by disregarding it I might be able to put a more sensible meaning on the whole. I have to construe it as it stands, and I have to put a meaning, if I can, upon the words " every other tax on income for the time being in force." I have, therefore, to consider what those words can mean, and to what they can refer.

It was submitted in argument, on behalf of the personal representatives of Sir Ernest Horlick, that those words referred to any tax which might be imposed in the future which was a tax upon income and which was deductible from payments, as in the case of income tax, but was not income tax. I confess that my imagination is unable to envisage such a tax. If a tax is a tax on income, and one which is deductible, as income tax is, it is extremely difficult to see how it could be anything other than income tax. In any event, whatever the possibilities of such a tax being invented in the future may be, I am satisfied that that explanation is not a satisfactory explanation of those words, nor does it explain to my mind why it was that those words were inserted in this settlement, and I must find, if I can, some sensible meaning which accounts for the presence of that phrase in this document. " Every other tax on income for the time being in force," as the law stands to-day, can refer to sur-tax alone. It clearly is not income tax, apart from sur-tax, because that has already been allowed for, and there is no tax at all on income other than sur-tax. In my judgment, it is impossible to escape from the conclusion that what the parties had in mind, when these words were inserted in this document, however ill-expressed or inapt some of the provisions in this settlement may be, was to make provision for the payment of sur-tax. If those words do not mean that, then, in my judgment, they are incapable of any sensible meaning at all.

If that be the true view, then, in my judgment, notwithstanding the indications which I have already pointed out, and which, standing by themselves, would have been sufficient, in my mind, to show reasonably plainly that all that the parties had in contemplation was income tax as distinguished from sur-tax, in the presence of those words, I think that the paramount intention to be found in this document is that Lady Oppenheimer was to receive £4,000 a year for her own use and benefit, and that that £4,000 a year was not to be reduced below that figure by any payment of either income tax on the £4,000 a year or sur-tax, which the executors have to pay in order that she may receive the £4,000 a year without any reduction in the amount.

So far as I can see, the matter is not covered by any of the cases which were cited to me, because there is no case in which the language is the same as the language in this. I appreciate that putting that construction on this document may raise difficult questions hereafter, and may (I do not say that it will) give rise to questions hereafter if Mr. Peter Horlick and/or Miss Elizabeth Horlick survive Lady Oppenheimer. What exactly their position may be, what their rights may be, are matters with which I am not concerned to-day, and on which I ought not to express any opinion at all. I am concerned only with the position of Lady Oppenheimer *vis-à-vis* the executors of Sir Ernest Horlick.

The provisions as to the payment in each year by equal quarterly payments are not impossible of being complied with, although they are not very apt if I am right in the construction which I have put upon the language. The same may be said of the provision in cl. (*e*), but, notwithstanding those facts which I have already pointed out, which seem to me by themselves strict enough to indicate that sur-tax was not in the minds of the parties, in the presence of the words, "every other tax on income for the time being in force," I find it quite impossible to come to any conclusion other than that the intention was that Lady Oppenheimer should receive £4,000 a year, that no income tax should be deducted from it, and that the sum which she was called upon to pay for sur-tax was to be made good to her, so that she received her £4,000 a year for her own use and benefit, and not reduced to any extent by any tax on income.

If that be the true construction of this settlement, it raises only the question as to the amount of sur-tax to be paid. On that question, it seems to me that the matter is really covered by authority. Moreover, apart from authority, it seems to me that, on the construction of this document, the true view must be that the sur-tax which Lady Oppenheimer has to pay is the sum which she is entitled to receive. It is suggested that the sur-tax payable is a notional sum, arrived at on the footing that the only income which Lady Oppenheimer has is £4,000 a year, which she receives as a *feme sole*. As I gather the argument, it would ignore even the small annual sum which the lady has in her own right, of something under £400 a year. The suggestion is that the amount to be ascertained is not the amount which the lady is called upon to pay, or is liable to pay, to the revenue, but a purely fictitious amount, arrived at in the way I have suggested. In my judgment, it is not open to me on the authorities to come to that conclusion, nor do I think, apart from authority, that any other conclusion can be the right one. If Lady Oppenheimer by the settlement is given the amount which is the amount of the tax on income which she has to pay—and that is the true construction of this settlement—then it seems to me to follow that she, having paid the tax to the inland revenue, is entitled to have that sum recouped by the trustees or by the executors of Sir Ernest Horlick. In these circumstances, I must make the declaration claimed in sub-para. (i) of the summons.

Solicitors: *Baileys, Shaw & Gillett* (for the trustees of the settlement and for Lady Oppenheimer); *Markby, Stewart & Wadesons* (for the executors of the estate).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

Re TURNER, TENNANT *v.* TURNER.

[Chancery Division (Simonds, J.), **April 1, 1938.]**

Executors—Bequest cum onere—Shares—Paramount lien for debts due to company—Equitable charge—Administration of Estates Act, 1925 (*c.* 23), *s.* 35 (1).

A testator who held 143,030 ordinary shares in a private company by his will bequeathed to his wife absolutely 10,000 of those shares in a company. Upon all these shares the company had, under its articles, a first and paramount lien for all debts and liabilities of the testator to the company, and at the date of his death the testator owed the company £24,424. The question arose whether, as a result of the Administration of Estates Act, 1925, s. 35, which extended the principle of Locke King's Acts, the shares in the hands of the testator's wife should bear a proportion of the charge to which his shares in the company were liable as between him and the company:—

Held: the lien on the shares created by the articles of association was an equitable charge upon the shares. The Administration of Estates Act, 1925, s. 35, applied to such a charge, and the testator's wife was primarily liable as between herself and the testator's estate to discharge a proportionate part of the debt due by the testator to the company at the time of his death.

[EDITORIAL NOTE. The object of the Administration of Estates Act, 1925, s. 35, was to place personal estate on the same footing as that on which real estate had stood since Locke King's Act. The real question here, however, is the exact effect in law of the creation of a paramount lien on the shares by the articles of association. Such a lien is held to be an equitable charge, and, as such, is within the actual words of the section, so that it is unnecessary here to consider the effect of the words "or otherwise" and how far they extend the charges on property which are subject to the section.

As to Charges on Property Given by Will, see HALSBURY, Hailsham Edn., Vol. 14, pp. 381, 382, paras. 710, 711; and for Cases, see DIGEST, Vol. 23, pp. 488, 489, Nos. 5557-5573.]

Cases referred to:

(1) *Re General Exchange Bank, Re Lewis* (1871), 6 Ch.App. 818; 9 Digest 343, *2171*; *sub nom. Re General Exchange Bank, London, Hamburg & Continental Exchange Bank's Claim*, 40 L.J.Ch. 429; 24 L.T. 787.

(2) *Everitt* v. *Automatic Weighing Machine Co.*, [1892] 3 Ch. 506; 9 Digest 343, *2167*; 62 L.J.Ch. 241; 67 L.T. 349.

(3) *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629; 9 Digest 343, *2169*; *sub nom. Re National Bank of Wales, Cory's Case*, 68 L.J.Ch. 634; 81 L.T. 363; *affd. on other grounds, sub nom. Dovey* v. *Cory*, [1901] A.C. 477.

(4) *Hopkinson* v. *Mortimer, Harley & Co., Ltd.*, [1917] 1 Ch. 646; 9 Digest 343, *2168*; 86 L.J.Ch. 467; 116 L.T. 676.

A SUMMONS to determine whether a legacy of 10,000 ordinary shares bequeathed by the testator's will, and upon which shares the company, by virtue of its articles of association, had a first and paramount lien for all debts owing by the testator to the company, should in the hands of the legatee bear a proper proportion of the charge to which the B testator's shares in the company were liable as between him and the company. The company in question was a private company with a capital of 200,000 £1 shares, of which 50,000 were preference shares and 150,000 ordinary shares. The testator at the time of his death held 143,030 ordinary shares, and these shares constituted the greater part of his C estate. At his death there was owing by the testator to the company £24,424, in respect of which the company had by its articles a paramount lien on the 143,030 shares held by the testator, and the question raised was whether the 10,000 shares bequeathed to the widow were liable to bear a proportionate part of the debt of £24,424. The relevant articles D and the section of the statute are set out in the judgment. The testator died on Apr. 26, 1928, and his will, dated Dec. 30, 1925, was proved on July 19, 1928.

L. M. Jopling for the plaintiffs.

J. Leonard Stone for beneficiaries interested in income.

E *G. D. Johnston* for infants interested in capital.

Jopling: The question is whether or not the shares bequeathed by cl. 7 of the will—which were shares upon which the company had a lien for money owing to it—ought to bear a proportionate share of the amount owing to the company, by reason of the Administration of F Estates Act, 1925, s. 35, which extends the principle of the Act known as Locke King's Act.

Stone: The fact that sect. 35 of the Act expressly includes a particular lien inferentially excludes any other lien. The section means something more than a mere accidental lien. I am asking the court to G say that the legislature intended this section to be applied to cases where a testator had expressly charged the property. The words "or otherwise" in the section are cut down by the words following—namely, "including a lien for unpaid purchase money."

Johnston: It is sufficient that I should satisfy the court that there is H an equitable charge, or that the charge comes within the words "or otherwise." The fact that in the company's articles the charge is called a lien cannot affect the question. What has been created in the present case is an equitable charge. The testator was a governing director of the company, and himself signed the articles. He had himself created the condition of affairs by which the company could sell the shares to reimburse itself in respect of this debt, and pay over the balance to the holder of the shares. That is exactly the position of a mortgagee. [Counsel referred to *Re General Exchange Bank* (1), *Everitt* v. *Automatic Weighing Machine Co.* (2), *Re National Bank of Wales, Ltd.* (3), *Hopkinson* v. *Mortimer, Harley & Co., Ltd.* (4).]

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SIMONDS, J.: In this case, the testator, by cl. 7 of his will, bequeathed to his wife absolutely 10,000 fully-paid shares of £1 each in the capital of Luke, Turner & Co., Ltd., and at his death his shares in the company were, under the articles of association of the company, held subject to what is in art. 10 (*j*) of the company's articles B described as a first and paramount lien in respect of sums owed by him to the company. The question which has been raised in these proceedings is whether or not, as a result of the Administration of Estates Act, 1925, s. 35, these 10,000 shares in the hands of his wife must bear a proper proportion of the charge to which his shares in the company C were held as between him and the company. The articles of association provide by art. 10 (*j*):

> The company shall have a first and paramount lien upon all shares registered in the name of each member (whether solely or jointly with others) and upon the proceeds of sale thereof for his debts liabilities and engagements solely or jointly D with any other person to or with the company whether the period for the payment fulfilment or discharge thereof shall have actually arrived or not and no equitable interest in any share shall be created except upon the footing and condition that art. 6 hereof is to have full effect.

Art. 6 provides:

> Save as herein otherwise provided, the company shall be entitled to treat the E registered holder of any share as the absolute owner thereof and accordingly shall not except as ordered by a court of competent jurisdiction or as by statute required be bound to recognise any mortgage or charge thereof or therein or any trust or equity in relation thereto or any equitable or other claim or any interest in such shares on the part of any other person.

Art. 10 (*k*) further provides:

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> Any such lien shall extend to all dividends from time to time declared in respect of the shares subject thereto.

Art. 10 (*l*) provides:

> Unless otherwise agreed the registration of a transfer of shares shall operate as a waiver of the company's lien (if any) on such shares.

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Some question was raised whether or not there had been a registration of transfer so as to operate as a waiver, but any such question has been abandoned. By Art. 10 (*m*), it is provided:

> For the purpose of enforcing such lien the directors may sell the shares subject thereto in such manner as they think fit.

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Then follows a qualification, which I need not read. Art. 10 (*n*) provides as follows:

> The net proceeds of any such sale shall be applied in or towards satisfaction of such debts liabilities or engagements and the residue (if any) paid to such member his executors administrators or assigns.

I have read these articles in order to see, not only what the right of the company was, but also what was included in the lien. That being the position as between the testator and the company, it is necessary now to see what is the text of the Administration of Estates Act, 1925, s. 35, because, until that Act took effect, there is no question that the A legatees took the shares free from any obligation between the testator and the company. Sect. 35 (1) provides as follows :

> Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or B otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged, shall as between the different persons claiming through the deceased, be primarily liable for the payment of the charge ; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

C Sect. 35 (2) declares that such other or contrary intention shall not be deemed to be signified by certain matters therein specifically referred to. It may be stated compendiously that this section of the Act of 1925 was intended to apply to real and personal estate the liability which hitherto was applied only to real estate by the Acts known as Locke D King's Acts. The earliest of these Acts—the Real Estates Charges Act, 1854—contained these words, in sect. 1 :

> . . . land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage . . .

It was held that, under these words, a vendor's lien for unpaid purchase E money would not be included. By an amending Act of 1867, a lien for unpaid purchase money was included in the expression mortgage. The Act of 1877 extended the previous Acts to land or hereditaments of whatever tenure which should, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, or any F other equitable charge, including any lien for unpaid purchase money. These words have been incorporated in the section of the Administration of Estates Act, 1925, which I have to consider, with the substitution for the words " lands or hereditaments of whatever tenure " of the words " an interest in property," and the addition of the words " or otherwise " G before the words " including a lien for unpaid purchase money." I have now to decide whether, in this condition of the law, the shares which are, as between the company and the testator, subject to a paramount lien are, in the hands of the legatee, subject to payment of the debt by that legatee. In looking through the articles, I read them for H the purpose of seeing what was the nature of the lien, and it must be clear, from the consideration of the articles themselves, and of the cases which have been decided upon similar articles, and particularly the case of *Re General Exchange Bank* (1), followed by *Everitt* v. *Automatic Weighing Machine Co.* (2) and *Re National Bank of Wales, Ltd.* (3), that in fact by articles such as these an equitable charge in the ordinary

sense of that expression is created in favour of the company. If that is so, it is not necessary for me to determine whether or not, and to what extent, a lien—such as a banker's or an innkeeper's—may be included within the operation of sect. 35. I do not have to consider the precise effect of the addition of the words "including a lien for unpaid purchase money" after the words "or otherwise" in this section. It is sufficient A
for the decision of this case to say that here there are shares which, at the time of the testator's death, were charged with the payment of money by way of equitable charge, and, if that is so, then the section applies, and under it the legatee taking the shares is made primarily liable as between herself and the estate of the testator, and is to be B
charged a proportionate amount of the money owing by the testator to the company at the date of his death.

Solicitors: *Sanderson, Lee & Co.* (for the plaintiffs); *Robinson & Bradley* (for all the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*] C

INLAND REVENUE COMMISSIONERS *v.* KERED, LTD. KERED, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Lawrence, J.), **March 23, April 12, 1938.**] D

Income Tax—Undistributed income—Company of limited membership—Loan creditor—Apportionment of income—Loan repayable by stated instalments—Finance Act, 1922 (c. 17), *s.* 21, *Sched. I—Finance Act,* 1936 (c. 34), *s.* 20.

An investment company had issued debentures, and the holder of the debentures was therefore a loan creditor within the meaning of the E
Finance Act, 1936, s. 20. For the year ending Nov. 30, 1935, the gross income of the company was £8,020 6*s.* 5*d.* The gross expenditure was £983 10*s.* 10*d.* The Crown contended that the difference in these amounts, £7,036 15*s.* 7*d.*, was the company's actual income, and should be apportioned, as to £225, to the shareholders, and, as to £6,811 15*s.* 7*d.*, to the loan creditor. The net income of the company was £6,215 15*s.*, F
the payments made to it being subject to deduction of tax. The expenditure of the company was also subject to deduction of tax, and its net expenditure was £973 13*s.* 1*d.* The net cash available in the company's hands for the redemption of the debenture was £5,242 1*s.* 11*d.* The company in fact paid the loan creditor £5,200 in part redemption of the debenture which was the instalment of capital agreed to be repaid in that year:— G

Held: (i) the special commissioners can only apportion to loan creditors the actual amount of the income expended in discharge of their loan capital, and not that amount grossed up by the addition of tax thereon.

(ii) the special commissioners could apportion to loan creditors only the sum actually paid in redemption of debt, and not a sum larger than that. Although the company had income sufficient to redeem a larger H
amount of the debt, that larger sum was not a sum "available to be expended or applied in redemption" within the Finance Act, 1936, s. 20 (4) (*b*).

[**EDITORIAL NOTE.** The Finance Act, 1922, s. 21, was passed with the avowed object of preventing the evasion of super-tax (which tax has since been replaced by sur-tax) by the retention of income by a particular class of companies, and the section gives the special commissioners power to apportion the income among the members of the company as if a reasonable distribution had been made. The provisions of this section are extended by the Finance Act, 1936, s. 20, so that certain loan creditors of the company are included in the definition of "member" of the company. The effect is to give the special commissioners power to apportion the income of the company among its shareholders and a loan creditor. The questions here debated are whether this apportionment should be based on the gross income of the company or the net income, and whether, where there is a subsisting agreement to repay the loan creditor a proper proportion of the money advanced, any further part of the income of the company can be apportioned to the loan creditor.

As to Computation of Income for Purposes of Sur-Tax, see HALSBURY, Hailsham Edn., Vol. 17, pp. 292, 293, paras. 578, 579; and for Cases, see DIGEST, Supp., Income Tax, Nos. 674g-674t.]

Appeals by way of case stated under the Income Tax Act, 1918, s. 149, and the Finance Act, 1922, by the commissioners for the special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The company was an investment company whose main asset was an annuity payable by H. W. Reeves under a deed of covenant dated Nov. 27, 1930. Reeves covenanted with the company that he or his personal representatives would for a period of 8 years from Dec. 25, 1930, pay to the company or its assigns an annuity of £8,000 without any deduction, except for income tax, so long as that tax remained at its then rate of 4*s.* 6*d.* in the £, and, if and when the rate of income tax was altered during the 8 years, Reeves would then pay to the company such a sum in every year as, after deduction of income tax at the current rate, would leave a clear sum of £6,200. The consideration paid by the company for this annuity was £40,950, and the total cost to the company, including stamp duty, was £41,360. The purchase price was paid in cash, and, as to part, was raised by the issue of 40 debentures of £900 each, bearing interest at 5 per cent. per annum, and repayable by annual instalments of varying amounts. The instalment repayable on Dec. 31, 1934, was £5,200. For the period under review—the year ending Nov. 30, 1935—the total income of the company was the annuity of £8,000, and £20 6*s.* 5*d.* mortgage interest. Out of this income was paid £822 in respect of debenture interest and £161 10*s.* 10*d.* in respect of management expenses. The difference between the totals of these items—taken as £7,036—was the actual income of the company from all sources for the year ending Nov. 30, 1935, and was apportioned as follows: to the shareholders, £225, and to the debenture holder, £6,811. The sum of £225 represented a free-of-tax dividend of £175 paid to the shareholders. The said sums of £8,000 and £20 6*s.* 5*d.* were subject to deduction of tax, and the actual amounts received by the company were £6,200 and £15 15*s.* respectively. For the same reason, the actual payments made by the company were £637 2*s.* 3*d.* in respect of debenture interest, £175 in respect of dividend, and £161 10*s.* 10*d.* for management expenses. By adding these figures, the net income of the company was £6,215 15*s.*, and the net payments were £973 13*s.* 1*d.*, and, by subtraction, the amount of cash remaining in the company's hands in respect of the year in question was £5,242 1*s.* 11*d.* During that year, the company paid to the debenture holder £5,200 in part redemption of the debentures.

The Finance Act, 1922, Sched. I, para. 8, provides as follows:

> The apportionment of the actual income from all sources of the company shall be made by the special commissioners in accordance with the respective interests of the members, and the income as apportioned to each member, so far as assessable and chargeable to super-tax under sect. 21 of this Act, shall, for the purposes of super-tax, be deemed to represent income from his interest in the company for the year or other period and shall be included in the statement of his total income or in an amended statement of total income which the special commissioners are hereby authorised to require and shall be deemed to be the highest part of that income.

The Finance Act, 1936, s. 20 (4) (*a*), (*b*), provides as follows:

> Where an investment company is deemed by virtue of the last foregoing sub-section to be under the control of not more than five persons by reason that any five or fewer persons would, if the company were wound up, be entitled as loan creditors to receive more than one-half of the assets therein referred to (whether or not it would otherwise be deemed to be under such control) (*a*) the definition of the expression "member" shall, for the purposes of the said sect. 21 and any provisions of this or any other Act relating thereto, be extended so as to include any loan creditor of the company; and (*b*) for the purpose of the Finance Act, 1922, Sched. I, para. 8, a loan creditor shall be deemed to have an interest in any income of the company to be apportioned under that paragraph to the extent that that income, or assets representing it, has or have been expended or applied or is or are available to be expended or applied in redemption or repayment or discharge of the loan capital or debt (including any premium thereon) in respect of which he is a loan creditor . . .

The company contended:

(1) That such part of the company's actual income from all sources for the said year ended Nov. 30, 1935, as was deducted in respect of income tax by the payers of the said annuity and mortgage interest respectively was not income (or assets representing it) expended or applied or available to be expended or applied in redemption or repayment or discharge of the said debentures.

(2) That the words "available to be expended or applied" in the Finance Act, 1936, s. 20 (4) (*b*), must be construed and applied with reference to the rights and obligations of the loan creditor and the company as they existed in the said year.

(3) That the amount of the company's income from all sources for the said year (or assets representing it) expended or applied or available to be expended or applied in redemption or repayment or discharge of the said debentures was £5,200 only, and the extent to which the said income (or assets representing it) was so expended or applied or available to be expended or applied was £5,200 only.

(4) Alternatively to contentions (2) and (3), that the amount of the company's income from all sources for the said year (or assets representing it) expended or applied or available to be expended or applied in redemption or repayment or discharge of the said debentures was £5,242 only, and the extent to which the said income (or assets representing it) was so expended or applied or available to be expended or applied was £5,242 only.

(5) That no part of the income tax borne by the company out of its income from all sources for the said year ought to be apportioned to the loan creditor under the Finance Act, 1922, s. 21, and the Finance Act, 1936, s. 20.

(6) That the amount of the company's income from all sources for the said year (the total amount of which was £7,036) to be apportioned to the loan creditor under the said sections was £5,200 or alternatively £5,242, and that the remainder of the company's said income (viz., £1,836 or alternatively £1,794) ought to be apportioned among the shareholders of the company.

The inland revenue commissioners contended:

(1) That the company's actual income for the said year was £7,036, and that after paying the said dividend of £225 the balance of £6,811 was income available

to be expended or applied in redemption or repayment of the said debentures, notwithstanding that the amount of the instalment which the company was liable to repay in the particular year was only £5,200, and that the apportionment, as set out in para. 4 above, was correctly made and should be confirmed.

(2) Alternatively that inasmuch as what fell to be apportioned was the gross and not the net income of the company, the income in which the loan creditor must be deemed to have an interest as a loan creditor was such an amount of the gross income of the company as (after deduction of tax) would produce the said sum of £5,200 and consequently that the sum of £5,200 should be grossed up and the gross amount apportioned to the loan creditor, and the balance of actual income then remaining apportioned to the shareholders.

The commissioners gave their decision as follows:

> Under the provisions of the Finance Act, 1922, Sched. I, para. 8, the apportionment is to be made in accordance with the respective interests of the members, and the income as apportioned to each member is, for the purposes of sur-tax, deemed to represent income from his interest in the company. . . . We think the words "available to be expended or applied" must be construed with regard to the rights of the loan creditor and the obligations of the company as they exist in the particular year under review. In the present case, in our opinion, the measure of the loan creditor's interest in the income of the company is determined by reference to the amount actually received in repayment, i.e., £5,200. That sum of £5,200 must be grossed up in arriving at the amount to be apportioned to the loan creditor. This sum was paid out of profits and gains charged to tax in the hands of the company. It represents, in our opinion, the extent to which the loan creditor is deemed to have an interest in the income of the company. We therefore apportion to the loan creditor £6,710, and we hold that the balance of the company's income—namely, £101—must be apportioned to the shareholders.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the Crown.

Cyril King, K.C., and *F. Grant* for Kered, Ltd.

LAWRENCE, J.: It is agreed that there are two questions to be decided: (i) whether, under the Finance Act, 1936, s. 20 (4) (*b*), the special commissioners can apportion to loan creditors such as the appellants the gross or the actual amount of the income which has been expended in discharge of their loan capital, and (ii) whether they can apportion to such loan creditors more than the sum due on the loan, if the income of the company is sufficient. It is common ground that the income to be apportioned is the statutory income, which is a notional, and not an actual, figure (see the Finance Act, 1922, s. 21, Sched. I, paras. 6, 8), and, in view of this, the Attorney-General contends that the words of the Finance Act, 1936, s. 20 (4) (*b*), "to the extent that that income has been expended in discharge of loan capital," must refer to the notional gross, and not to the actual, amount of income which has been expended in discharge of any loan capital. In my opinion, that is not the true meaning of the words used. The words in themselves are more apt to describe actual expenditure in discharge of the actual sum owed. It is true that the statutory income is in a sense notional, but it has a basis of fact, and can, as a rule, provide the tax charged on it, and in certain circumstances also the sum expended in discharge of loan capital; but a sum which discharges loan capital must of necessity be an actual, and not a notional, sum. Suppose, for instance, that the company has a statutory income of £4,000, and the amount of loan capital due to be discharged in the year in question is £3,500, the income tax being £1,000, only £3,000 of the loan capital can be discharged, but, according to the Crown's contention, £4,000 has been expended in the discharge of loan capital within the meaning of sect. 20 (4) (*b*). Such an interpretation of the words is not, in my opinion, natural.

I am also of opinion that the appellants' construction is supported by the words which follow, " or is available to be expended in discharge of loan capital." I do not think that it can fairly be said that a notional sum is available for the discharge of loan capital. There is only one sum which will discharge the loan capital—namely, the amount of the loan capital. The sum which is paid for income tax is not available for the discharge of loan capital. For these reasons, I am unable to agree with the decision of the commissioners on the first point.

On the second point, it is contended for the Crown that the whole statutory income of the company for the year of assessment is available within the meaning of the Finance Act, 1936, s. 20 (4) (*b*), notwithstanding that, according to the contract between the company and its loan creditor, such sum is not due to the loan creditor in the year in question. The loan creditor was entitled to be paid in the year of assessment the sum of £5,200, but, the net income of the company being £5,242, it is contended for the Crown that, even if the net, and not the gross, income is to be regarded, the £42 must be apportioned to the loan creditor, on the view that it was available for the discharge of his loan capital in the future.

The commissioners have decided against the Crown's contention on this point, and I am of opinion that they were right. I do not think that the income can be said to be available to be expended in discharge of the debt when, though the money is there, and available in that sense, it cannot be expended in discharge of the debt.

It was contended for the appellants that, on the Crown's argument, the whole amount of the loan capital might be apportioned each year to the loan creditor. To this the Attorney-General answered that this result would not follow, because, if the whole amount of the loan capital had been apportioned to the loan creditor, there would be no more available for the discharge of the debt. However, this answer does not seem satisfactory to me. If " available " means income notionally or actually in the company's hands, but not expended, it is necessary to introduce a further notion to make it not available when it is still in the company's hands and not expended—namely, a notional expenditure by reason of the apportionment. In my opinion, the natural meaning of the subsection is that the commissioners can apportion to loan creditors the actual amount which was expended, or which might have been expended, in redeeming their loan capital. The case will be remitted to the commissioners to amend the apportionment.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Herbert Reeves & Co.* (for Kered, Ltd.).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

UNITED STEEL COMPANIES, LTD. *v.* CULLINGTON (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **April 6, 7, 1938.]**

Income Tax—Deductions—Wear and tear—Trading losses—Carrying forward deductions—Amalgamation of companies—Right of new company to accrued deductions of constituent companies—Income Tax Act, 1918 (c. 40), *Sched. D, Cases I and II*, rr. 6, 11—*Finance Act*, 1926 (c. 22), *ss.* 32, 33.

The S.B. Co., Ltd., had been carrying on a business for a number of years before 1930, and had at no time made any profit. A large sum had accumulated in respect of allowances for wear and tear and trading losses, which had been carried forward from year to year. The U.S. Co. had similarly accumulated allowances in respect of wear and tear and trading allowances. On Aug. 22, 1930, these two companies were amalgamated into one company, but in fact the two businesses were carried on as branches of the one company:—

HELD: the new company was in the position of a successor to the two constituent companies, and was entitled to carry forward the wear and tear allowances, but not those in respect of trading losses.

[EDITORIAL NOTE. A company formed by the amalgamation of two other companies is in law a legal entity distinct from the two constituent companies, but it is, for the purposes of income tax, a successor to the constituent companies, just as an ordinary person may be a successor to a business. It is therefore entitled to carry forward the allowances in respect of wear and tear. The similar question arising upon trading losses was not pressed, and it seems clear that the judge thought that the latter allowances could not be carried forward.

AS TO CARRYING FORWARD ALLOWANCES, see HALSBURY, Hailsham Edn., Vol. 17, p. 169, para. 344; and FOR CASE, see DIGEST, Vol. 28, p. 42, case *m*.]

Case referred to:

(1) *Scottish Shire Line, Ltd.* v. *Lethem* (*Surveyor of Taxes*) (1912), 6 Tax Cas. 91; 28 Digest 42, case *m*.

CASE STATED under the Income Tax Act, 1918, s. 149, by the commissioners for the special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The United Steel Companies, Ltd., was a company formed on Aug. 22, 1930, by the amalgamation of two companies, one called herein the 1918 Steel Co. and the other the Strip Co. The two companies were amalgamated under a scheme of arrangement sanctioned by the court. The accounts of the two companies were continued without any break at Aug. 22, 1930, and the businesses of the two companies were also carried on without any break, being treated, as from that date, as branches of the United Steel Companies, Ltd. The Strip Co. commenced trading on Dec. 1, 1921, and had not, up to the date of the amalgamation, made any profit whatever, and a claim of roughly £450,000 in respect of allowance for wear and tear and of £44,000 in respect of trading losses was outstanding at that date, and was carried forward.

The 1918 Steel Co. came to an arrangement with the inland revenue on Aug. 10, 1928, whereby its liabilities in respect of income tax, excess profits duty and corporation profits tax up to Apr. 5, 1927, were satisfied. From that time the company did not make such a profit as would exhaust the deductions to which it was entitled in respect of wear and tear, and there was a sum in respect of wear and tear and for trading losses carried forward.

It was contended, *inter alia*, on behalf of the company :

(*a*) That by virtue of the order of the court dated Aug. 16, 1930, the rights as well as the property of the Strip Co. and the 1918 Steel Co. were vested in the company without further act or deed ; (*b*) that the rights conferred by the Income Tax Act, 1918, Sched. D, Cases I and II, r. 6, and by the Finance Act, 1926, s. 33, were among the rights so vested in the company ; (*c*) that in accordance with the said order the businesses carried on by the 1918 Steel Co. and by the Strip Co. respectively were not discontinued but were continued without interruption in the name of the company, which did not set up a new trade or business ; (*d*) that in these circumstances Sched. D, Cases I and II, r. 11 (as amended by the Finance Act, 1926, s. 32) is not applicable and its application would be inconsistent with the intention of the Companies Act, 1929, ss. 153, 154, and of the order of the court made in pursuance of those sections ; (*e*) that the liability of the company for income tax for all years should be computed throughout by reference to the profits or losses of the year preceding the year of assessment with the right to set off against the assessment for 1936-37 any losses and wear and tear allowances which become available by that method of computation, whether such losses and allowances arise from the 1918 Steel Co., from the Strip Co. or from the company.

It was contended, *inter alia*, on behalf of the Crown, that :

(*a*) The company on Aug. 22, 1930, succeeded to the trades of the 1918 Steel Co. and the Strip Co. within the meaning of subsect. (2) of the new r. 11 substituted by the Finance Act, 1926, s. 32 ; (*b*) the company therefore falls to be assessed as if a new trade had been set up or commenced on Aug. 22, 1930 ; (*c*) the company is not entitled to set off against its own profits the allowances for wear and tear and losses in respect of which relief could not be given to the 1918 Steel Co. and the Strip Co. at the date of the incorporation of the company ; (*d*) the reliefs to which the company is entitled under the Income Tax Acts are in no way affected by the terms of the order or the Companies Act, 1929.

Having considered the arguments and evidence adduced before them, the commissioners found that the company succeeded on Aug. 22, 1930, to the trades previously carried on by the 1918 Steel Co. and the Strip Co., and falls to be assessed as if a new trade had been set up or commenced on that date. They held that the company was not entitled to the wear and tear allowances or losses to which the said 1918 Steel Co. and the Strip Co. were entitled at the date when the company was incorporated—namely, Aug. 22, 1930.

Sir William Jowitt, K.C., *Raymond Needham, K.C.*, *W. Gordon Brown* and *J. S. Scrimgeour* for the appellants.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

LAWRENCE, J. : In this case the question is whether or not the appellant company, which is a new company, which amalgamated under the Companies Act, 1929, the 1918 United Steel Co. (as it is called in the case) and the United Strip and Bar Mills, Ltd., is entitled to deduct wear and tear and losses allowances of the constituent companies for the years before the amalgamation, and this question turns primarily upon the construction of Sched. D, Cases I and II, r. 11, which was amended by the Finance Act, 1926, s. 32.

The constituent companies of the appellant company—that is to say, the 1918 United Steel Co. and the United Strip and Bar Mills, Ltd.—have had losses in the past, and have never made profits. In those circumstances, wear and tear allowances had accumulated. It is contended on behalf of the appellants that the amalgamated company—the appellant company—is entitled to carry forward, and to have the benefit of, those wear and tear allowances of its constituent companies and the losses of its constituent companies, both under the provisions of the Sched. D, Cases I and II, r. 11, as amended by the Finance Act, 1926, s. 32, and also by reason of the provisions of the Companies Act, 1929, ss. 153, 154, under which the appellant company was created. The question of losses, whilst not being abandoned, was not pressed by Sir William Jowitt, and I formed the view that the claim of the appellant company could not be substantiated in that matter, turning, as it does, upon the Finance Act, 1926, s. 33, which does not relate in any way to a succession, and seems to confer merely a personal right upon the person who is carrying on the trade.

The main question as to the wear and tear allowances depends upon the construction of r. 11, and it is important to consider the state of the law before 1926 and after 1926. In this connection, Sir William Jowitt points out that the rule which deals with the wear and tear allowances is not a rule of computation, but a charging rule.

Before 1926, when income tax was assessed and computed upon the basis of the three preceding years, the Income Tax Act, 1918, Sched. D, Cases I and II, r. 6, provided:

> (1) In charging the profits or gains of a trade under this schedule, such deduction may be allowed as the commissioners having jurisdiction in the matter may consider just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on.

That is a deduction which is to be allowed by the commissioners during the year of charge and in respect of that year, and has no relation to the three preceding years, which are years upon which the computation to tax is based. By r. 6 (3) it was provided, where the full effect could not be given to such deduction because there were not profits sufficient to permit of the deduction, that the deduction might be carried forward. Rule 9 provided that, where there was a succession to a trade, the commissioners might adjust the assessment by charging the successor with a fair proportion of the assessment from the time of his succeeding to the trade, profession, or vocation, and by relieving the person originally charged from a like amount. Rule 11 provided that, on changes of proprietorship, the tax payable by the person or persons who carry on the trade, profession, or vocation, after the change should, notwithstanding the change, be computed according to the profits and gains of the trade, profession, or vocation during the period prescribed by the Income Tax Acts.

The effect of those rules before 1926 was, I think, that, where there was a change of proprietorship and a succession, the tax would be computed by reference to the three years previous to the year of assessment, and would be assessed upon the predecessor, and an adjustment would be made with reference to the time during which the successor continued the trade. In those circumstances, the question was brought before the courts in Scotland whether the carrying forward of the wear and tear allowance would apply to a successor. It was held in *Scottish Shire Line, Ltd.* v. *Lethem* (*Surveyor of Taxes*) (1) that the provisions of r. 6 (3) did apply to a successor.

After 1926, r. 6 remained in its original form, and r. 11 was altered, providing in the first subsection for the case of partnerships where one or more persons, who until the change of partnership have been engaged in the trade, continue to be engaged therein that the tax payable by the person or persons who carry on the trade after that time shall, notwithstanding the change, be computed according to the profits and gains of the trade, profession or vocation during the period prescribed by the Income Tax Acts. That is to say, the rule there uses the same words as does the original r. 11, but the period prescribed by the Act of 1926, instead of being three years previous, was one year previous. The rule goes on to provide that, where all the persons who were engaged in the trade, both before and after the change, wish to do so, they can send the surveyor a notice requiring that the tax payable :

> . . . shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced, and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place. . .

That gave to members of a partnership an option different from that which had been given to them by the original r. 11. Rule 11 (2) deals with successions other than successions in the case of partnerships where some of the partners remain the same, and provides that if any person succeeds to a trade :

> which until that time was carried on by another person . . . the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued.

It is argued for the Crown that the effect of r. 11 (2) is that on a succession the person who succeeds is to be taxed exactly as if he had not succeeded, but had set up an entirely new business, and that the effect of that is to exclude any right which he would previously have had under r. 6 (3) to carry forward the wear and tear allowance. As Sir William Jowitt has pointed out, r. 11 is a rule which relates to the computation of tax, and provides for computation in accordance with the terms of the Act of 1926, and for assessment both upon the predecessor and the successor in case of a succession. He contends that it in no way affects r. 6, which is really a charging section, entitling the taxpayer to a deduction in respect of wear and tear allowance, not by reference to the year of computation, but by reference to the year of assessment. He points out that there is a marked contrast between the words of r. 11 (2) and those of r. 11 (1) in the proviso; for whereas in r. 11 (2) the words are:

> If at any time . . . any person succeeds to any trade . . . the tax payable . . . shall be computed as if he had set up or commenced the trade,

the words of the proviso are:

> that the tax payable . . . shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced. . .

It is argued for the appellants that, if the intention had been to do away altogether with the doctrine of succession, so as to make a complete division for all purposes at the point where the successor took on the trade, it would have been natural and simple to have used the words "as if he had set up or commenced a new trade," whereas the words used, "as if he had set up or commenced the trade," grammatically apply to the trade to which the person has succeeded. It is also argued that, as there is, according to the contention of the appellant, ample to satisfy the meaning of r. 11 (2), in that it alters the rules as to assessment and as to computation in the case with which it is dealing, it is not right to construe that subsection as applying to rules of charge such as r. 6, with results of such very great importance.

In my judgment, the argument for the appellants is correct. No meaning has been suggested for the contrast between the words used in the proviso to r. 11 (1) and those used in r. 11 (2), and I cannot think that the legislature, if it had intended to effect so great a change with reference to the carry forward of the wear and tear allowance, would have effected that change by such words, words which do not expressly refer to the subject at all, and which are amply satisfied by the meaning to which I have already alluded.

It was contended for the Crown that r. 11 (2) refers back to the rules applicable to Sched. D, Cases I and II. Rule 1 (2) provides that, where a trade has been set up and commenced within the year preceding the year of assessment, the computation shall be made on the profits or gains:

> for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI.

It is no doubt true that r. 11 (2) does provide for that method of computation. Nevertheless, that does not, in my opinion, throw any light upon the contrasted words to which I have referred in r. 11 (2) and r. 11 (1) and it does not in any way affect the force of the argument that these are rules of computation, whereas the deduction of wear and tear allowance is a rule of charge.

The Crown also relied upon the terms of the opinions in *Scottish Shire*

Line, Ltd. v. *Lethem* (*Surveyor of Taxes*) (1), at p. 98, where LORD DUNDAS said:

> The Crown has treated the appellant company as the old company by taking that company's profits during the preceding years as the basis for assessing the appellants' profits for 1910. I think it would be anomalous if we were to permit the Crown to treat the appellants as a new and different concern when it comes to the matter of the wear and tear deduction.

They referred also to the opinion of LORD SALVESEN, where he said, at p. 99:

> Even in a taxing statute it is legitimate to consider which of two possible constructions is most in accordance with the spirit and intention of the Act. Now the appellants admittedly fall to be assessed for income tax exactly on the same footing as the Elderslie Co. to whose concern they succeeded. If so, can any reason be suggested why they should not be entitled to the same deductions from those profits as their predecessors, had they remained in business admittedly would have been ?

Those observations were not, I think, the main basis of the opinions, and I do not think that they alter in any way the view which I take of the construction of the Act of 1926. In my opinion, as I have said, the amendment of r. 11 in 1926, was introduced to alter the method of assessment and the periods of computation where there was a succession, and not for the purpose of altering the other rights of a successor. When I read r. 11 in conjunction with r. 6, which still stands in the statute, it appears to me to have no effect upon the right of a successor to carry forward the wear and tear allowance of his predecessor.

The other argument which was addressed to me on behalf of the appellant was that, by virtue of the provisions of the Act of 1929, sects. 153 and 154, the amalgamated company, which is the appellant company, really represents the two constituent companies, and is entitled to any rights which they may have had under r. 6 in reference to carry forward of wear and tear allowance. I cannot accede to that argument, because I do not think that the general terms of the Companies Act, 1929, indicate any intention to vary the terms of the Income Tax Acts with reference to succession, and, although a company which amalgamates other companies under the Act of 1929, does amalgamate them, and therefore fuse them, it is still another legal *persona*, and does not, in my judgment, acquire thereby any rights greater than those of a successor of another type.

I therefore hold that, if the construction which I have put upon r. 11 (2) is incorrect, the appellant company would not, by virtue of its creation under the Act of 1929, be entitled to the carry forward of this wear and tear allowance. For these reasons, I find myself unable to concur in the judgment of the commissioners, and the appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Johnson, Weatherall, Sturt & Hardy* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

HIBERNIAN BANK, LTD. *v.* GYSIN & HANSON.

[KING'S BENCH DIVISION (Lewis, J.), **May 2, 1938.**]

Bills of Exchange—Bill payable to order of payee only—Crossed "not negotiable"—Negotiability—Bills of Exchange Act, 1882 (*c.* 61), *ss.* 8 (1), 81.

A The plaintiff bank was the holder for value of a bill of exchange drawn for £500. The defendants, in the course of their business with the drawers, the Irish Casing Co., Ltd., accepted the alleged bill, due three months after date, and made payable to the order of the company "only." It was also crossed "not negotiable." At the due date the drawers had become indebted to the acceptors in a sum greater than the value of the bill. On presentation, the defendants instructed the B bank at which it was payable not to pay, claiming a right to set off the balance due to them. In view of the indorsement "not negotiable" and the order to pay to the order of the drawers "only," it was contended for the defendants that the plaintiffs had no better title to payment than had the drawers against whom the acceptors had the above set-off.

HELD: (i) the words "not negotiable" written across a bill of C exchange have their ordinary meaning and not the special meaning given to them in the case of a cheque by the Bills of Exchange Act, 1882, s. 81.

(ii) the fact that the bill was drawn payable to the order of the payee did not prevent its negotiability being prohibited by the addition of the words "not negotiable."

[EDITORIAL NOTE. The Bills of Exchange Act, 1882, s. 81, gives a special D meaning to the words "not negotiable" when written on a cheque. The question here is whether this same meaning must be given to these words when written on a bill of exchange. It is further argued that a bill payable to the order of a payee must be transferable. Both these contentions are rejected.

AS TO "NOT NEGOTIABLE," see HALSBURY, Hailsham Edn., Vol. 2, p. 660, para. 911; and FOR CASES, see DIGEST, Vol. 6, pp. 442, 443, Nos. 2843-2845.]

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Case referred to:

(1) *National Bank* v. *Silke,* [1891] 1 Q.B. 435; 6 Digest 443, *2846*; 60 L.J.Q.B. 199; 63 L.T. 787.

ACTION by the holders of a bill of exchange accepted by the defendants. F The facts, the terms of the bill, and the arguments are fully set out in the judgment.

Charles Rochford for the plaintiffs.

Valentine Holmes for the defendants.

G LEWIS, J.: This case raises a very interesting question. It is quite a short point, and I think that it is conceded by counsel on each side that, except in so far as the point was dealt with in *National Bank* v. *Silke* (1), it is a point which has never been decided by the court. The plaintiff's counsel says that it has never been decided, because it is so H obvious that the judges in *National Bank* v. *Silke* (1), when they expressed their opinion about the point, were right. On the other hand, Mr. Valentine Holmes, on behalf of the defendants, says that it is obvious, if one looks at the sections of the Act, that the plaintiffs in this case must be wrong, and it is obvious that nobody has ever taken the trouble to test the matter in the courts.

The position is that a claim is brought for the sum of £504 4*s.* 11*d.* against the defendants, as acceptors of a bill of exchange for £500, dated Feb. 23, 1937, drawn by the Irish Casing Co., Ltd., and accepted by the defendants, payable at Barclays Bank three months after date to the order of the drawer, and indorsed by them, and now held by the plaintiffs as holders for full value. The bill, on presentation, was dishonoured. The bill was for £500, and the interest and other charges make up the full sum of £504 4*s.* 11*d.*

The plaintiffs have undertaken to satisfy me that this is a bill which is negotiable. The bill in fact reads in this way:

> Three months after date pay against this first of exchange to the order of the Irish Casing Co., Ltd., only the sum of £500 effective value received.

It is crossed "not negotiable," and Mr. Rochford, who has argued the case on behalf of the plaintiffs, says that, in spite of the fact that the body of the document contains the word "only," and that it is crossed "not negotiable," that bill is negotiable.

The main point which he makes is that, where a bill is made out to the order of AB, or somebody, that bill can never be rendered not negotiable. As I understand it, that is his first point. His second point is that, even if it is possible to render a bill made out to order not negotiable, or not transferable, then, in the words of the Bills of Exchange Act, 1882, s. 8 (1), the bill must contain words prohibiting a transfer, or indicating the intention that it should not be transferable, before one can make that bill a bill which is not negotiable. He says that the presence of the words "not negotiable" and the presence of the word "only" are not sufficient to render it not negotiable. He has placed great reliance upon *National Bank* v. *Silke* (1), which was a case in which an action was brought upon a cheque. The cheque was drawn to the order of J. F. Moriarty, Esq., for £450, and was crossed by the drawer "Account of J. F. Moriarty, Esq., National Bank, Dublin." Mr. Moriarty indorsed the cheque and sent it to the plaintiffs, the National Bank, at Dublin, with a letter directing them to credit his account with that sum. His account was then slightly overdrawn. The plaintiffs wrote acknowledging receipt of the cheque "for your credit." The cheque arrived in Dublin on the 30th, and the amount was at once placed to the credit of Moriarty, which made a balance of about £443 to his credit. Eventually the cheque, when it was sent to London, was returned with orders not to pay, and an action was then brought by the National Bank against Mr. Silke.

In the course of their judgments in that case, Lindley, L.J., who delivered the leading judgment, and Fry, L.J., both dealt with the matter in passages which have been read by counsel on each side. Lindley, L.J., for his part, said, at p. 439:

> I will assume for the purposes of this case that under those provisions [the Bills of Exchange Act, 1882, s. 8 (1), (4)] you can draw a bill expressed to be payable to order or to bearer, and yet make it not transferable; though I am disposed to think

> that you cannot. But if you can, there must be plain words prohibiting transfer or showing an intention that the bill shall not be transferable. Ambiguous words will not do.

It appears to me that LINDLEY, L.J., in that case is really deciding that, if one can do it, which he does not in fact decide, it can be done only by words which clearly prohibit the transfer, or clearly show an intention that the bill shall not be transferable.

FRY, L.J., says very much the same thing. He says, at p. 439:

> As regards the first point [the question whether or not one can make a bill payable to order not negotiable], I am inclined to think that sect. 8 divides bills into three classes—bills not negotiable, bills payable to order, and bills payable to bearer; so that a bill payable to order must always be negotiable. But assuming that a bill payable to order can be made not negotiable under section 8 (1), I am clearly of opinion that the words used in the present case neither prohibit transfer nor indicate an intention that the cheque should not be transferable.

Both judges appear to me really to be deciding the second point—namely, whether or not the words which that particular cheque contained were sufficient to show a prohibition of transfer, or a clear intention that the bill should not be transferable. The only words upon that cheque which were relied upon were the words of the crossing—namely, "Account of J. F. Moriarty, Esq., National Bank, Dublin." It is said that that case of *National Bank* v. *Silke* (1) has always been relied upon for the proposition that one cannot make a bill which is made out to the order of somebody a not negotiable bill, and those *dicta* of LINDLEY and FRY, L.JJ., are, so I am told by counsel, relied upon as being an authority for that proposition.

It is right that I should point out, as has been pointed out to me, that the author of PAGET ON BANKING, 4th Edn., p. 114, has adopted that as being the correct law. He says that from the sections of the Act it is to be deduced, and it is demonstrated, that any bill on which the word "bearer" or "order" appears, or on which it is imported by the statute

> is and remains a negotiable bill, and that no words prohibiting transfer or indicating an intention that it should not be transferred have any place thereon or any effect on its negotiability.

Mr. Valentine Holmes, on behalf of the defendants, says, and says with truth, that the remarks of the judges who decided *National Bank* v. *Silke* (1) were really only *dicta*, and their attention was really devoted only to seeing whether or not the words on the cheque itself were sufficient to make it not negotiable. He points out that, if that is right, the Bills of Exchange Act, 1882, s. 8 (1), means nothing at all, and need not be in the Act, and I am inclined to think that he is right about that. Then he goes on to say that there are two things in this bill of exchange which show that it is not negotiable, or at least that there was an intention to make the bill not transferable in the very clearest possible way. The first is the word "only." I think that I am right in saying that he does not rely so strongly on the word "only" (although he says that some weight must be attached to it) as he does on the expression "not negotiable." As I have said, the words are "to the order of the Irish Casing Co., Ltd., only." Mr. Valentine Holmes argues that that must mean something, and that it must mean that, instead of the bill being paid to the Irish Casing Co., Ltd., or to the order of anybody else to whom they may order it to be paid, it means that it is to be paid to the order of the Irish Casing Co., Ltd., only, which, of course, does not prohibit their sending it to their bank as their agents for collection. A

However, he relies more, as I understand his argument, upon the words "not negotiable," and he asks the rhetorical question: "What words are more apt to express that the bill is not to be negotiable than to put across the face of it 'not negotiable'?" He prays in aid sect. 81 of the Act, with regard to which also counsel for the plaintiffs had something to say. Sect. 81 of the Act is the only section, as far as I am aware, which says anything at all about the words "not negotiable." B

Sect. 81, which deals only with cheques, reads:

> Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. C

Counsel for the plaintiffs says that that indicates that the words "not negotiable," when one is construing the Bills of Exchange Act, do not mean what they appear to mean, and that, when the document is marked "not negotiable," the only effect of those words is to show that it is a document which is transferable, but it does not give to the transferee any better title than that which the transferor had. Mr. Valentine Holmes, on the other hand, prays in aid that section, and he says that the proper meaning of it is that the words "not negotiable" mean that it is not negotiable, and that it cannot be negotiated or transferred. When that appears on a cheque, however, it has not got its literal meaning, but it has got the meaning which is given to it by the terms of sect. 81, and he says that the mere fact that that section is put into the Act, and deals with cheques which are marked "not negotiable," saying that the words "not negotiable" are to be interpreted in a certain way, and to give certain rights, shows that that was an exception to the obvious common-sense meaning of the words "not negotiable." He says that it is quite clear that anybody who writes the words "not negotiable" across a bill of exchange means what he says, and means that the bill is not to be transferred, and is not to be negotiated. D E F G

I have some hesitation in deciding as I have, because it would appear from what I have said, and from the judgment that I am disposed to give, that I am upsetting a decision of 1891, a decision of the Court of Appeal, in which Lindley, Bowen and Fry, L.JJ., constituted the court. I think the argument which Mr. Valentine Holmes has presented to me is a very forcible one, and it seems to me that I am entitled to say that the question which the court had before it in that case was not the question which I have before me to-day, and the observations of Lindley and Fry, L.JJ., were really only H *dicta.* On the view that I have formed, and from the argument that I have heard, I am bound to say that I think that in this case this was a document, a bill of exchange, a three-months' bill, upon which it was expressly stated that it was not to be transferred or negotiated. I cannot conceive any stronger words than the words " not negotiable " written across a bill of exchange. They must mean something, and they clearly do not mean what they would mean if they were put across a cheque. Those are, in my view, the clearest possible words, written across a bill of exchange, to say that the bill of exchange is not to be negotiable, and I have difficulty, in considering the matter, in appreciating the argument put forward by counsel—namely, that a cheque payable to order can never be negotiable. I have some difficulty in appreciating that, and, in my view, there must be judgment in this case for the defendants.

Judgment for the defendants with costs.

Solicitors : *Stibbard, Gibson & Co.* (for the plaintiffs) ; *Kenneth Brown, Baker, Baker* (for the defendants).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

CHISHOLM *v.* LONDON PASSENGER TRANSPORT BOARD.

[King's Bench Division (Hilbery, J.), **April 28, 1938.]**

Street Traffic—Pedestrian crossing—Controlled crossing—Applicability of regulations—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, *regs.* 3, 5.

The plaintiff, crossing the street at a road intersection controlled by traffic lights, was injured by an omnibus, which had at the time of the accident crossed the intersection. It was found as a fact that he had stepped on to the crossing before the omnibus reached the pedestrian crossing used by the plaintiff. The Pedestrian Crossing Places (Traffic) Regulations, 1935, reg. 3 requires a vehicle to approach a crossing at such a speed that it can stop before reaching the crossing unless it can be seen that there is no pedestrian thereon. Reg. 5 requires a driver approaching a light-controlled crossing to allow uninterrupted passage to a pedestrian who has started to cross before he receives the signal to go on :—

Held : (i) the driver of the omnibus must be held to have been negligent as the pedestrian was upon the crossing before his vehicle reached it.

(ii) the circumstances of this case were governed by reg. 3 and not by reg. 5.

[EDITORIAL NOTE. Upon the first point this case follows the decision of the Court of Appeal in *Bailey* v. *Geddes* (1). The second point, however, is a matter of considerable importance as it is decided that reg. 5 only applies to the crossing at which a vehicle enters the intersection.

As to Pedestrian Crossings see HALSBURY, Hailsham Edn., Vol. 16, p. 492, para. 724 ; and for Cases, see DIGEST, Supp., Street and Aerial Traffic, Nos. 31*a*, 31*b*.]

Case referred to :

(1) *Bailey* v. *Geddes*, [1938] 1 K.B. 156 ; [1937] 3 All E.R. 671 ; Digest Supp. ; 157 L.T. 364.

Action for damages for personal injuries received by the infant plaintiff, who was knocked down by an omnibus, the property of the defendants, as he was crossing the street on a pedestrian crossing.

The Pedestrian Crossing Places (Traffic) Provisional Regulations, regs. 3, 5, are as follow:

> 3. The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.
>
> 5. The driver of every vehicle at or approaching a crossing at a road intersection where traffic is for the time being controlled by a police constable or by light-signals, shall allow free and uninterrupted passage to every foot passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing.

H. Glyn-Jones for the plaintiff.

N. R. Fox-Andrews for the defendants.

Hilbery, J.: The plaintiff, Robert Bruce Chisholm, an infant, 15 years of age, brings this action against the London Passenger Transport Board claiming damages for personal injuries received on Mar. 8, 1937, about 1.30 p.m., at the eastern end of Fleet Street, where Fleet Street leads into Ludgate Circus. The infant plaintiff came from New Bridge Street, and was minded to cross the mouth of Fleet Street, going from the south to the north pavement. At the Ludgate Circus end of Fleet Street there is an island refuge in the middle of the road, and there is a pedestrian crossing marked by the appropriate studs in the roadway, and, I have no doubt, by the appropriate beacons. The infant plaintiff, after he had come from New Bridge Street, walked along the pavement which curves round on the south-west portion of Ludgate Circus, in order to bring himself opposite the end of the pedestrian crossing. He says that before he left the pavement he took a glance to the right—at any rate, as far as somewhere near the middle of Ludgate Circus, which seems to be all that was required, if he was avoiding traffic coming from the east—and then, looking across the road in the direction in which he wished to go, he observed that the traffic coming down Fleet Street from the west, had come to a standstill at the crossing. He thereupon began to hurry across the road, and the next thing he was sensible of was that a vehicle of some sort, which turned out to be an omnibus, was upon him. He made a leap back, but was caught and injured by the oncoming bus.

The first contest of fact that arises is whether or not, when he left the pavement, he proceeded upon the pedestrian crossing. I am satisfied that the plaintiff began to cross the road—hurrying across, it is true—on the pedestrian crossing provided at that point. The next thing to determine is where the omnibus was at that time. The omnibus had not then reached the pedestrian crossing. In other words—and this, I think, is of great importance in the matter—the bus was approaching the crossing, and was still a vehicle approaching the crossing, at the time when the infant plaintiff stepped upon the roadway within the bounds of the pedestrian crossing.

The Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, reg. 3, dated Jan. 25, 1935, provides:

> A The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.

The effect of that regulation has been considered by the Court of Appeal in *Bailey* v. *Geddes* (1), and I am bound by the decision of the Court of Appeal and must give effect to it. The Court of Appeal has laid down, B as it appears to me, that, once a pedestrian is upon a pedestrian crossing to which that regulation applies, and a vehicle is an approaching vehicle to which the regulation applies, any want of care on the part of the pedestrian which might have prevented him from recovering at common law is irrelevant, because the Court of Appeal has said that the duty C put upon that driver by the regulation is such that, had he obeyed it, he must have avoided any negligence there might be on the part of the plaintiff. The effect of the decision in the Court of Appeal is summarised by SLESSER, L.J., where he says, at p. 166:

> D Reg. 3 says that unless the driver can see that there is no foot passenger thereon he must proceed at such a speed as to be able, if necessary, to stop before reaching such crossing; and reg. 4 imposes an obligation upon him to give precedence to a foot passenger on the crossing. Now if his duty is to stop, it is physically impossible in such a case that the cause of the accident can be the negligence of the plaintiff, because *ex hypothesi* the defendant, if he has done his duty, has already stopped.

That I believe to be the passage which summarises the decision. I am E not myself quite satisfied that a regulation which says that a driver must be driving at such a speed as to be able, if necessary, to stop is the same thing as saying that, if there is a pedestrian on the crossing before the driver arrives on it, it is his duty to stop. I am not at all sure that those two things are necessarily the same. However, there F is the decision of the Court of Appeal, and it appears to me that I have to give effect to it, and I am bound by it. In those circumstances, once I have arrived at the conclusion at which in fact I have arrived—namely, that the plaintiff was on the pedestrian crossing when he set out from the kerb, and that at that time the omnibus was a vehicle within G the meaning of reg. 3 approaching a crossing with a pedestrian upon it—then it follows, I think, that the defendants are liable.

I want to say something further, because of the interesting argument which has been put forward on the subject of whether or not reg. 3 was applicable to this particular crossing at all. Mr. Fox-Andrews argued H that this was a controlled crossing, and that it must come within reg. 5, and that reg. 5 and reg. 3 are mutually exclusive the one of the other. I do not myself so read or construe the two regulations. First, I think that it is important to remember exactly what it is that occurs at Ludgate Circus. There is a light-control at Ludgate Circus, and it is also in a sense controlled by a police constable, since the police constable works the lights, and they are not mechanically worked. The police constable working those lights in the traffic-control box which stands at the mouth of Farringdon Street, so far as the traffic in Fleet Street and Ludgate Hill are concerned, works a set of lights at the mouth of Fleet Street, and a set of lights at the mouth of Ludgate Hill, and at the mouth of Fleet Street and at the mouth of Ludgate Hill there is a pedestrian crossing. When the police officer changes the lights to red and stops the traffic in Ludgate Hill, he stops, as well, the east-bound traffic in Fleet Street, and, of course, when he does that, he releases the traffic, or gives the green light to traffic, in New Bridge Street and Farringdon Street. When the traffic in New Bridge Street and Farringdon Street. the north and south traffic, is stopped, the traffic which is flowing down Ludgate Hill from east to west can filter into New Bridge Street to the left, or cross and turn at the opportune moment into Farringdon Street. However, the pedestrian crossing is a crossing at the mouth of Fleet Street, which appears to me to be a crossing at a road intersection, and the pedestrian crossing at Fleet Street is a pedestrian crossing again at a road intersection. That seems clear. Equally, the pedestrian crossing at the mouth of New Bridge Street and the pedestrian crossing at the mouth of Farringdon Street may be said each to be a pedestrian crossing at a road intersection. Reg. 5 is the regulation which contains those words "at a road intersection," qualifying the word "crossing," which are not found in either of the two other regulations. Reg. 3 is, in express terms, a regulation affecting the driver of a vehicle approaching a crossing *simpliciter*. Reg. 4 affects the driver of every vehicle at or approaching every crossing where the traffic is not for the time being controlled by a police constable. Reg. 5 alone, however, contains the words "approaching a crossing at a road intersection where traffic is for the time being controlled by a policeman," and I think that reg. 5 is designed, as Mr. Glyn-Jones has urged, to have a particular application to the pedestrian crossing which is placed at a road intersection. Clearly, anyone can see that, where a pedestrian crossing occurs at the foot of Ludgate Hill, or at the mouth of any one of those other three roads leading to Ludgate Circus, it is a pedestrian crossing at a road intersection. Each of them is a pedestrian crossing at a road intersection, but at what road intersection ? It appears to me that, when the light on Ludgate Hill which controls the Ludgate Hill traffic is turned to green, so as to enable the traffic to go on, the intention of reg. 5 then comes into operation, and that, although the traffic which has perhaps been stationary at that crossing gets the signal to go on, it must still allow free and uninterrupted passage across the pedestrian crossing to every foot passenger who has started to go over the crossing before the driver has received the signal that he may proceed over the crossing. If, however, one extends the application of the regulation to such a place as Ludgate Circus, it would be applicable to all the crossings that occur at the mouths of the other roads which join Ludgate Circus, so that the operation of one set of lights brings the regulation itself into operation with regard to all pedestrian crossings, and would produce the sort of difficulty and danger which, as Mr. Glyn-Jones has pointed out, must necessarily occur if one gives that interpretation to the regulation. No such difficulty will arise if one deals with the regulation as a regulation intended to apply to that to which it says it is to apply—namely, a crossing at a road intersection. Confine it to any one of these crossings, according as the light is being worked at one or the other, and the regulation gives the protection which it is designed to give. To take an example of what I have said, if the traffic is released from Ludgate Hill, the driver of a vehicle which has been standing on the studs must give precedence, and allow free and uninterrupted passage, to every foot passenger who has begun to cross over before the driver received the signal. When he has done that, and has passed over that crossing, and is minded to go across and turn up into Farringdon Street, then that is not the regulation which would apply. The regulation which then comes into force is the regulation which then affects him as a driver approaching a crossing. In giving that interpretation, one avoids the difficulty which would otherwise occur in regard to the respective rights and priorities as between the pedestrians and the vehicular traffic. I think that it ought to be noticed that reg. 5, while I give it that interpretation, does not say the driver of every vehicle at or approaching any of the crossings at a road intersection, but it says the driver of every vehicle at or approaching a road intersection, and contemplates the one crossing at the road intersection which is the crossing that that driver happens to be approaching.

I think that this is a case where reg. 5 did not apply, but reg. 3 did apply, and that this is a case where the omnibus driver was a driver of a vehicle approaching a crossing, and that crossing was a crossing on which there was a foot passenger—namely, the infant plaintiff, who had a right to expect the driver of the omnibus to drive in accordance with the regulations, as the Court of Appeal has said.

There is another aspect to this case, and that is that it is a startling thing to hear the omnibus driver say that, while driving an omnibus of the most modern type in the service of the London Passenger Transport Board, where he sits almost on the extreme front of the engine—on its off side, it is true—as he came across Ludgate Circus, the lights at the foot of Ludgate Hill having been green to him, he failed to notice, although there was a considerable distance between him and the main traffic which had crossed over going westward, that the east-bound traffic had stopped in the mouth of Fleet Street as he crossed the circus. That seems to me to have been one of the many things which a driver in London has to keep his eyes upon, and for which he must be on the look-out, because at a place like that it is the warning, and the only warning, which he will get of the change of light. He does not get a light which shows towards him to the east at the mouth of Fleet Street, but the warning he gets of the change of the light from red to red and amber is that the traffic is stopping because the amber light is showing. It stops in the mouth of Fleet Street, short of the pedestrian crossing, and, to the driver of an omnibus coming into Fleet Street from Ludgate Circus—possibly the last vehicle of the traffic which starts from east to west—the important thing is that he knows, and must apprehend as a driver, that pedestrians will step upon the pedestrian crossing and A begin to cross the road, and that they will do that just as he is about to cross there. Not only did he never notice that, which may have been because he was paying particular attention to his side of the road, but also the odd thing is that he never saw this boy until he was actually in collision with the omnibus. That is very odd, especially when I look at B the photographs and see where the omnibus ended up, because I think that it is perfectly clear that he was coming along in a position which would have taken him, the driver of the omnibus, nearer to the island in the middle of the road than to his near-side kerb if he had kept a straight course, without mishap, because the angle which he left when C he swerved to the off, and the position of the back wheels of the omnibus, allowing for the short pull-up he made, indicate to me that he would be just about in that position on the crossing. There was apparently an ample space between him and his near-side kerb, over which the plaintiff passed, for the driver to have seen him, even though the plaintiff D was hurrying. One would have expected that, if the driver had been keeping the look-out there which he ought to have been keeping, he would have seen this boy either bound from the kerb or come across that short distance into the side or front of the omnibus. However, in truth he says : E

> I never saw him until he came into collision with my bus. I never saw the traffic had stopped.

I know it had stopped, because the policeman told me that he turned the lights to amber after the omnibus had passed the mouth of Ludgate Hill and was crossing Ludgate Circus, which coincides with the plaintiff's F evidence—namely, that, as he got to the kerb by the pedestrian crossing, the traffic in Fleet Street stopped, which is exactly what one would expect. The omnibus driver, however, seems to have come into collision with the plaintiff without ever seeing him at all, and without ever having noticed that the traffic in Fleet Street had stopped, so that he might G reasonably anticipate that a pedestrian would step on to the pedestrian crossing. I am bound to say that I think that, in those circumstances, he was guilty of a want of that degree of care that was called for on his part in those particular circumstances.

The other question which arises is whether or not, in the particular H circumstances, the plaintiff was guilty of contributory negligence. Whether he was or not does not really affect my decision, because I am bound by the Court of Appeal decision that reg. No. 3 applies. I think it fair, however, to state my view of the matter, and I think that it has been apparent to many of us for some time that the introduction of pedestrian crossings and these regulations has given rise to fresh problems where contributory negligence is alleged on the part of pedestrians. If it is right to say that the pedestrian is entitled to expect the driver at all times to obey those regulations, then it seems to me to follow that the pedestrians are not guilty of want of care for their own safety if they step on to a pedestrian crossing on which there is no vehicle, although they do not look to see what vehicles are approaching, because they are entitled, according to the Court of Appeal, to expect that, if a vehicle is approaching when they step on to the crossing, that vehicle will stop. The plaintiff in this case says : " I looked to the right. I did not look further than a certain distance to the right, but there was not, within such distance as I looked, at any rate, any vehicle approaching. The crossing was clear, and the traffic in Fleet Street was stopped. There was nothing on the crossing, and, in those circumstances, I stepped upon the crossing at an appropriate moment upon which to step upon the pedestrian crossing and regard myself as safe." He does not say all that to me, but that is what the plaintiff's case conveys. I do not think that he is saying what is untrue when he says that he took a glance to the right. However, what, above all, led him to go into the road—hurrying as he was—was the fact that he had just arrived at the pedestrian crossing in what appeared to be the nick of time, when the traffic stopped, for pedestrians to go across, and he went on to the crossing, in those circumstances, regarding himself as having, as it were, the right of the road. Having regard to the regulation and to the Court of Appeal decision, I am not prepared to hold that there was any contributory negligence on his part. It is not for me to comment upon the peculiarities and the apparent hardships which seem to follow upon that application of that regulation in the light of certain decisions. I must give effect to it. In these circumstances, I do not think that I am justified, having regard to the state of the regulations and the decision to which I have referred, in saying that in this case there was any contributory negligence, or want of reasonable care for his own safety on the part of the plaintiff.

Solicitors : *Gardiner & Co.* (for the plaintiff) ; Solicitor to the London Passenger Transport Board (for the defendants).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

ALL SOULS COLLEGE, OXFORD *v.* MIDDLESEX COUNTY COUNCIL.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Macnaghten, JJ.), **April 5, 1938.**]

Compulsory purchase—Purchase for public purposes—Claim for compensation—Arbitrator's power to award interest—Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57), *s.* 6*—Arbitration Act,* 1934 (*c.* 14), *s.* 11.

A local authority, as empowered by the Middlesex County Council Act, 1934, s. 35, resolved to acquire certain lands owned by the claimants. It was agreed, *inter alia*, that the sale and purchase should be effected as if the local authority had obtained, and as if there had come into operation, a compulsory purchase order under sect. 35 of the Act of 1934, and as if a notice to treat had been served by the local authority for the compulsory purchase of the said lands on Feb. 1, 1936. The claimants claimed compensation, with interest thereon at 4 per cent., from Feb. 1, 1936, and, as the parties could not agree, the assessment of such compensation was referred to an Official Arbitrator. It was now conceded by the claimants that the decision in *Collins* v. *Feltham Urban District Council* (1), determined that interest on the amount of compensation was payable as from the date of the arbitrator's award only, and not from any earlier date. The main question now before the court was whether the Arbitration Act, 1934, s. 11, applied to this assessment of compensation, and empowered the arbitrator to award interest as from the date of the award :—

Held : the Arbitration Act, 1934, s. 11, was not applicable to this arbitration.

[EDITORIAL NOTE. The Arbitration Act, 1934, s. 11, by enacting that arbitration awards shall carry interest as from the date thereof, brings such awards into line with ordinary judgments. It is here held that this section does not apply to the assessment of compensation by an Official Arbitrator under the Acquisition of Land Act, 1919.

As to Interest on Arbitration Awards, see HALSBURY, Hailsham Edn., Supp., Arbitration, para. 1119 ; and for Cases, see DIGEST, Vol. 2, pp. 472, 473, Nos. 1171-1177.]

Case referred to :

(1) *Collins* v. *Feltham Urban District Council,* [1937] 4 All E.R. 189 ; Digest Supp.

Special Case Stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6. By virtue of the Middlesex County Council Act, 1934, s. 35, the Middlesex County Council on Feb. 27, 1936, passed a resolution to acquire certain lands at Barn Hill, in the urban district of Wembley, comprising 159.92 acres owned by All Souls College, Oxford, the claimants. Two agreements embodying the terms of sale and purchase were executed by the parties on Dec. 11, 1936. There had been no entry by the acquiring authority upon the said lands or any part thereof, and notice to treat for the compulsory purchase of the said lands was deemed to have been served by the acquiring authority on Feb. 1, 1936. The claimants claimed the sum of £262,500 as compensation for the acquisition of the said lands, and for injurious affection of adjoining lands of the claimants, with interest thereon at 4 per cent. from Feb. 1, 1936, but, as the parties could not reach agreement as to the amount of compensation, that matter was referred to arbitration. Compensation was assessed by the arbitrator at the sum of £214,800, subject to the opinion of the High Court as to the award of interest.

It was contended for the acquiring authority that the claimants were entitled only to the value of the lands as between a willing seller and a willing buyer at the date of the service of the notice to treat, and, if that was the proper basis of assessment of the claim, it excluded any right in the arbitrator to award interest. It was further contended that in any event the Arbitration Act, 1934, s. 11, did not apply to this arbitration. If the latter section did apply, it was admitted that the decision in *Collins* v. *Feltham U.D.C.* (1) excluded any claim for interest for a period prior to the date of the award. The only remaining question for the opinion of the High Court was whether the arbitrator had any power to award interest on the amount of the award from the date thereof.

The Arbitration Act, 1934, s. 11, provides:

> A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

A. M. Trustram Eve, K.C., and *Arthur Capewell* for the claimants.

Cyril Radcliffe, K.C., and *Harold Williams* for the acquiring authority.

LORD HEWART, L.C.J.: The first of the questions submitted is whether the Arbitration Act, 1934, s. 11, applies to this arbitration. In the unanimous opinion of this court, that section does not apply to this arbitration, and the subsequent questions do not arise.

Solicitors: *Charles Rogers, Sons & Abbott* (for the claimants); *Solicitor to the Middlesex County Council* (for the acquiring authority).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

SHEPHERD *v.* HUNTER.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **May 3, 1938.]**

Negligence—Damages—Personal injuries—Loss of expectation of life—Child aged three—Proper basis of compensation—Law Reform (Miscellaneous Provisions) Act, 1934 (*c.* 41).

A healthy child, aged three, was killed in a road accident. The representative brought an action in which, after a perfectly proper summing up, the jury awarded £90 in respect of the child's loss of expectation of life:—

HELD: this verdict was clearly erroneous, and there should be a new trial.

[EDITORIAL NOTE. This case carries the question of the assessment of damages for the loss of expectation of life a step further, but the decision in itself is of rather a negative character. It seems clear that the Court of Appeal have now held that such damages in the case of an infant are necessarily larger than those in the case of an adult person. It is also clear that such damages are not a matter of mere arithmetical calculation, though there seems no reason why this should not be so in the case of healthy and intelligent individuals who have safely passed the earliest stages of infancy and are not involved in hopeless difficulties. This would apply in the majority of cases, it being remembered that it is the condition of the plaintiff before the injury that has to be considered.

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016; and FOR CASES, see DIGEST, Vol. 36, pp. 125, A 126, Nos. 831-838.]

Cases referred to:

(1) *Flint* v. *Lovell*, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231.

(2) *Rose* v. *Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174. B

(3) *Phillips* v. *London & South Western Ry. Co.* (1879), 5 Q.B.D. 78; 17 Digest 176, *784*; 41 L.T. 121.

(4) *Roach* v. *Yates*, [1938] 1 K.B. 256; [1937] 3 All E.R. 442; Digest Supp.; 107 L.J.K.B. 170.

(5) *Trubyfield* v. *Great Western Ry. Co.*, [1937] 4 All E.R. 614; Digest Supp.; 158 L.T. 135. C

(6) *Morgan* v. *Scoulding*, [1938] 1 K.B. 786; [1938] 1 All E.R. 28; Digest Supp.; 158 L.T. 230.

(7) *Reid* v. *Lanarkshire Traction Co.*, [1934] S.C. 79.

APPEAL from a decision of SINGLETON, J., sitting with a common jury at Manchester, dated Nov. 25, 1937. The facts of the case are fully set D out in the judgments.

N. B. Goldie, K.C., and *R. Lambert* for the appellant.

G. J. Lynskey, K.C., and *G. G. Blackledge* for the respondents.

Goldie, K.C.: This jury could not have taken all the circumstances into consideration. A child ought to get damages larger than those given E to an adult in respect of loss of expectation of life. In the phrase "normal expectation of life," "normal" means "ordinary," and "expectation" means the mean duration of life. *Phillips* v. *London & South Western Ry. Co.* (3) affords the true basis of computation of these damages. The proper way is to find out the ordinary mean duration of life of the child, F and then to deduct something for the changes and chances of life. No reasonable jury could have arrived at this sum of £90. [Counsel referred to *Trubyfield* v. *Great Western Ry. Co.* (5), *Morgan* v. *Scoulding* (6), *Flint* v. *Lovell* (1), *Rose* v. *Ford* (2), *Roach* v. *Yates* (4).]

Lambert (following on the same side): The judge misdirected the jury G by not explaining to them the difference between a child of three and a hopeless or incurable invalid.

Lynskey, K.C.: The judge thought that this figure was reasonable. There is at present no standard on which one can base an estimate of damages under this head. A child of three is just at the beginning of a H dangerous period, and has not yet passed the stage of childish ailments. In *Reid* v. *Lanarkshire Traction Co.* (7), only £300 damages were given in respect of all causes of action. The jury were properly directed, and there is no material on which this court can act.

Goldie, K.C., was not called on in reply.

Greer, L.J.: This is an unfortunate case. It presents a problem for this court to solve which is almost impossible accurately to determine. Until the decision in *Flint* v. *Lovell* (1), it was not thought (notwithstanding the view that the House of Lords took in *Rose* v. *Ford* (2)) that the diminution in the length of life of an injured person could give rise to a claim for damages, even when occasioned by the wrongful act of the defendant. That view, however, cannot survive now, having regard to the decision of this court in *Flint* v. *Lovell* (1) and the decision of the House of Lords in *Rose* v. *Ford* (2). The problem that is set when the plaintiff is alive is not so difficult nor so impossible as it is after the plaintiff has died, especially when the death has taken place a few minutes after the wrong. However, in its wisdom, Parliament has said that, though the estate may have lost not one penny, but may have gained a very considerable sum, by the death of the deceased, still the administrator or executors, as the case may be, of the estate, as representing those who have gained by the death of the injured man, shall have the same remedy as that which the injured man would have had if he had remained alive. That is statutory, and we are bound to follow it.

In this case, the action was brought by the representative of a deceased infant, who lived only ten minutes after the accident, and, though there was no direct evidence as to what his expectation of life would have been as estimated by actuaries of an insurance company, the jury were entitled to take into consideration the fact that it is well known that a healthy child of 3 years of age has a substantial expectation of life. If they took that into consideration—subject to the risks that a child of that tender age might meet with accidents of all sorts, might be one of those unfortunates who, by some accident in the street, loses its life long before the ordinary and normal expectation of life has been reached—and arrived at a figure which was a happy medium, and a business result, which could be justified as the amount at which they could put the expectation of life of the infant, deducting from it all the risks to which, in the condition of life in which this infant was, it was exposed, then no one could rightfully have complained of the verdict of the jury.

In my judgment, the verdict of the jury is properly described as one that was clearly erroneous in the amount which they awarded, and, applying that test, which was one of the tests applied in *Phillips* v. *London & South Western Ry. Co.* (3), I think that the plaintiff is entitled to an order for a new trial in order that the amount may be re-estimated by another jury.

I have not said anything in my judgment so far with regard to the judge's summing up, which is complained of by the appellant. All I desire to say about that is that the judge called the attention of the jury to all the matters they were entitled to consider, and quite properly called their attention to everything that they were entitled to consider, and no complaint can reasonably be made of the summing up of the judge to the jury.

SLESSER, L.J.: I agree. This, I think, is the first case which has
brought before this court the problem of how damages are to be calculated
in respect of loss of expectation of life. In both *Flint* v. *Lovell* (1)
and *Rose* v. *Ford* (2), there was no question as to the amount which was
to be attributed to that particular loss. The question arose later whether
that amount, so assessed, was recoverable, and whether the amount A
would vest in the administrators or executors of the deceased person.
As LORD ATKIN points out in *Rose* v. *Ford* (2), at p. 834:

> How the damages are to be calculated is a question which this House has not to decide, for there has been no quarrel with the amount fixed by the Court of Appeal in this case of £1,000. B

It has been indicated by this court, however, in a more recent decision,
that questions may well arise in particular cases which may involve
special considerations. I refer to *Roach* v. *Yates* (4), where I ventured to
suggest that problems might arise where the person injured was of a rather
unusual kind with regard to the prospects of enjoyment of his life. C
That problem does not arise in the present case. The only special circumstance
here is that this person who was here killed, and whose loss of
expectation of life, it is now said, was vested in his estate, was an infant,
and I do not propose to travel beyond that particular problem. LORD
WRIGHT seems to indicate in *Rose* v. *Ford* (2), at p. 850, that there are, D
in addition to the ordinary question of giving what is fair and moderate
in view of all the uncertainties and contingencies of human life, certain
special cases. He mentions as special cases those of an infant, or of
an imbecile, or of an incurable invalid, or of a person involved in hopeless
difficulties. The last three to which LORD WRIGHT there refers seem to E
support the view which I had formed in the later case of *Roach* v.
Yates (4)—namely, that the fact that the injured man was of a suicidal
tendency, or suffered from some defect of living, might be material.
What does LORD WRIGHT mean, though, when he speaks of the special
case of an infant? One may exclude from this case all question of there F
being evidence of any disease, or liability to early death. In the present
case, the undisputed evidence is that this was a healthy and intelligent
child of three years, and one would have thought *a priori* that, if
damages were to be given for loss of expectation of life, where the expectation
of life was reasonably greater, as in the case of an infant, than in G
the case of an adult, the damages would normally be larger. I rather
read LORD WRIGHT as saying that one is not necessarily driven to that
conclusion when he speaks of the special case of an infant, and the
case has to be considered on all reasonable views, not merely measured by
a mathematical consideration that an infant will probably live longer H
than an adult. I do not read him, on the other hand, as suggesting that,
because an infant is subject to certain greater risks, being in an uncared
for condition when young, than is an adult, that is to override the
consideration of its expectation of life, notwithstanding those risks,
by reason of the fact that the one great and supervening risk of old age,

which ultimately accounts for the destruction of all men, is one which operates at that time in favour of the infant. However, he does speak of the special case of an infant, and it may well be that, in the case of an infant, it would not be right, merely because the person was very young, mathematically to give him double what he would have had A when he was double that age.

In the present case, I can see no reason whatever which can lead me to the conclusion that the jury properly took into consideration the matters to which their attention was directed. They appear to me to have given to this infant, with an expectation of life of at least 30 years B —I think that we may reasonably take judicial notice of that—such damages as are, in effect, no damages at all. They have given a sum which may be represented as expressing their view that this infant's life was worth something in the nature of £2 or £3 a year. Mr. Lynskey suggests—I was rather surprised to hear the suggestion come from him C —that the local consideration that this infant lived in Lancashire and that this was a Manchester jury might have brought about this result. I cannot think that it is a question of local consideration at all. I think that one must consider it generally. It may even be that this child would have ended its life in some very happy rural area, listening to D nothing but farmyard sounds and smelling sweet odours. However that may be, I think that it is impossible to say that £90 can, on any view, be proper compensation for this loss of expectation of life. For that reason, I agree that there must be a new trial.

E MACKINNON, L.J.: I do not dissent, but I assent with some hesitation. The summing up was admirable, and it is not open to any criticism. The assessment of damage on this head is a very difficult problem. Indeed, no task can be more difficult for either a jury or a judge. If I had had to guess in the place of the jury, I should, no doubt, F have fixed on a sum larger than that on which they fixed, but I doubt whether I ought to say that the sum fixed by the jury was so unreasonably small as to mean that their verdict ought to be set aside. The trial judge evidently did not think it an unreasonable amount. Personally, I think that it was too small. The doubt I have is whether or not G I ought to hold that it was so unreasonably small that we should order a new trial. However, my brethren do think so, and I defer to their opinion, and agree in the result.

Appeal allowed with costs. New trial ordered as to damages alone. Costs of first trial to abide the result of the second. Leave to appeal refused.

H Solicitors: *Maddocks & Colson*, agents for *P. Kemp Lee*, Barrow-in-Furness (for the appellant); *Sharpe, Pritchard & Co.*, agents for *W. A. Chislett*, Barrow-in-Furness (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

AVERY *v.* LONDON & NORTH EASTERN RY. CO.
HARRIS *v.* LONDON & NORTH EASTERN RY. CO.
BONNER *v.* LONDON & NORTH EASTERN RY. CO.
WATSON *v.* LONDON & NORTH EASTERN RY. CO.

[House of Lords (Lord Maugham, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen, and Lord Macmillan), **March 17, 18, 21, May 9, 1938.]**

Negligence—Negligence of fellow-servant causing death—Statutory liability—Proceedings by widow of deceased but not by children—Amount recoverable by widow—Fatal Accidents Act, 1846 (*c.* 93), *ss.* 1, 2, 3, 4, 5—*Fatal Accidents Act,* 1864 (*c.* 95), *ss.* 1, 3—*Employers' Liability Act,* 1880 (*c.* 42), *ss.* 1, 3.

Workmen's Compensation—Fatal accident—Compensation—Proceedings by children but not by widow of deceased—Amount recoverable by children—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 8, 10, 29 (1).

Several workmen were fatally injured in a collision due to the negligence of a fellow-servant. The widow in each case brought proceedings against the employers under the Employers' Liability Act, 1880, and the children proceeded under the Workmen's Compensation Act, 1925 :—

Held : (i) the widow in each case was entitled to recover the whole amount of damages which she proved herself to have sustained within the terms of the Act of 1880.

(ii) the children in each case were also entitled to recover compensation without limitation within the maximum prescribed by the Act of 1925.

Order of Court of Appeal ([1937] 2 All E.R. 777) *reversed.*

[EDITORIAL NOTE. The House of Lords have here restored the judgment of the county court judge and reversed the decision of the Court of Appeal. The result is that, where dependants resolve to sever their remedies, one class proceeding under the Employers' Liability Act, 1880, and another under the Workmen's Compensation Act, 1925, each class can recover up to the maximum amount allowed by the relevant statute. It is said, however, that, where failure to recover under the Employers' Liability Act will lead to a claim under the Workmen's Compensation Act, then judgment in the claim under the latter Act should be postponed until the claim under the Employers' Liability Act has been determined.

As to Amount Recoverable, see HALSBURY, Hailsham Edn., Vol. 22, pp. 207, 208, paras. 362-365 ; and for Cases, see DIGEST, Vol. 34, pp. 236, 237, Nos. 2018-2021 ; and HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 199, paras. 439-441 ; and for Cases, see DIGEST, Vol. 34, pp. 408-413, Nos. 3322-3359.]

Cases referred to :

(1) *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon* (*or Waddell*), [1931] A.C. 575 ; Digest Supp. ; 100 L.J.P.C. 113 ; 145 L.T. 289 ; *affg.* S.C. *sub nom. Waddell* v. *Kinneil Cannel & Coking Coal Co., Ltd.* (1930), 23 B.W.C.C. 567.

(2) *Darling* v. *Gray & Sons* (1892), 19 R. (H.L.) 31.

(3) *Pollok* v. *Workman* (1900), 2 F. 354.

(4) *Pym* v. *Great Northern Ry. Co.* (1862), 2 B. & S. 759 ; 36 Digest 129, *855* ; 31 L.J.Q.B. 249 ; 6 L.T. 537 ; *affd.* (1863), 4 B. & S. 396 ; *previous proceedings* (1861), 2 F. & F. 619.

Appeals by the appellants from eight orders of the Court of Appeal (Slesser and Romer, L.JJ., and Luxmoore, J.), dated May 11, 1937, and reported in [1937] 2 All E.R. 777, and eight cross-appeals by the respondents from the said orders, whereby decisions of His Honour JUDGE LANGMAN, given on Oct. 9, 1936, were set aside. The facts and the issues raised are set out in the opinions.

Sir William Jowitt, K.C., *G. J. Lynskey, K.C.*, and *W. Shakespeare*
A for the appellants.

F. P. M. Schiller, K.C., and *F. W. Beney* for the respondent company.

LORD MAUGHAM, L.C. [read by LORD ATKIN]: My Lords, this appeal is one of considerable difficulty and importance, and I was en-
B gaged in preparing an opinion designed to show my reasons for being obliged to differ from the Court of Appeal when I was enabled to peruse the judgment prepared by my noble and learned friend LORD ATKIN. That opinion so completely coincides with my own that, without intending any disrespect to the Court of Appeal, I do not feel justified
C in taking up the time of your Lordships in expressing, perhaps in language not so clear and precise, my own views. In these circumstances, I shall content myself by saying that I agree in all respects in the opinion of my noble and learned friend.

D LORD ATKIN: My Lords, this is an appeal from an order of the Court of Appeal who set aside judgments and awards of His Honour JUDGE LANGMAN, in proceedings in the County Court of Lincolnshire, holden at Grantham, and directed new trials. The proceedings all arose out of the same accident, in which four workmen, servants of the re-
E spondent railway company, were killed. They were being carried in the course of their employment in a ballast train, which was run into by two light engines negligently driven by servants of the railway company. The case therefore came within the Employers' Liability Act, 1880, s. 1 (5), which provides:

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> Where personal injury is caused to a workman . . . (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any . . . locomotive engine . . . upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

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The result was that the widows and children of the respective workmen had the rights of compensation and remedies given to them by the Fatal Accidents Acts, 1846 and 1864, the first of which is generally known as Lord Campbell's Act, and also had the rights of compensation given
H to them by the Workmen's Compensation Act. Under sect. 29 (1) of that Act, the workman (and by sect. 48 (3) this includes his dependants) has only an option to claim under the Act or to take proceedings independently of the Act. The option, however, is one to be exercised by each individual claimant: *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon (or Waddell)* (1). If proceedings are taken by virtue of the

Employers' Liability Act, they are subject to a limit to the amount of compensation recoverable under the Act, which, by sect. 3, is not to exceed a sum equivalent to three years' earnings of a person in conditions similar to those of the injured workmen. The limit under the Workmen's Compensation Act is arrived at on similar principles, but may be rather larger. In the present cases, the widows and children, acting no doubt under the advice of the workmen's trade union, adopted a uniform policy. The widows made a claim under the Employers' Liability Act, the children claimed as dependants, total or partial, under the Workmen's Compensation Act. The county court judge therefore had before him four actions, in which the widows were plaintiffs, and four arbitration proceedings, in which the children were applicants. In the actions, he assessed the damages to two of the widow plaintiffs at the full amount of the maximum sum, and to two of the plaintiffs at something less than the maximum sum. In assessing the damages, he refused to take into account that there were other dependants, the children, who were not claiming in the actions. In the arbitration proceedings, he awarded to the applicant children compensation either for total or for partial dependency. In no case did he award the maximum under the Act, but in each case he declined to take into consideration the fact that there was another dependant, the mother, who was not in fact applying for compensation under that Act. The Court of Appeal have held that the judge was wrong. As I understand their judgment, it is that both the Employers' Liability Act and the Workmen's Compensation Act provide a limited compensation for a group of injured dependants. The compensation in both Acts must be awarded as though all the injured group were before the court, and no one member is to get more compensation than he or she would have got if compensation were being assessed for all. One could not, therefore, award the total maximum to a mother if there were in fact children dependants, but only her fair share in the family group. Similarly, in workmen's compensation proceedings, one could not distribute the total maximum among the children applicants, as the mother's share is outstanding. It is true that one or more claimants might renounce their share in favour of others, but that would only be on the footing that they had claimed their share and assigned it to the others, and, if that were done, they would be precluded, under the option provision, from claiming under the alternative proceeding.

My Lords, I am unable to agree with this construction of either Act. The question may be considered historically. If a claim were made under Lord Campbell's Act after 1846, it is manifest, I venture to think, that no question of group compensation arises. The action for damages, to which for the first time by sect. 1 the tortfeasor is made liable, is by sect. 2 expressed to be for the benefit of the wife, husband, parent and child of the person killed. The words "parent" and "child" are by sect. 5 expanded to include grandparents and step-parents, grandchildren and step-children. They obviously, however, are not the group to whom compensation is to be awarded. They form the class of which injured members may recover compensation, and the only proceeding in which such injured members may recover compensation is in an action brought for them and naming them, with an express statutory provision in sect. 4 that with the declaration there must be delivered full particulars of the person for whom, and on whose behalf, the action is brought, and of the nature of the claim. The jury are to give damages proportionate to the injury to the parties respectively for whom, and for whose benefit, the action shall be brought, and the amount so recovered, after deducting the costs not recovered, by sect. 2,

> shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

The amount of the injury is a question of fact in each case, and, when found, the damages constitute a legal debt due to each of the persons to whom the jury have awarded damages. There is no room for consideration of a dependant not named, and therefore not before the jury. The quantum of damages in such a case is not a proportion of a limited sum. It would not be different though one or more injured persons had not claimed. One action alone can be brought, and the persons who stand out stand out for ever. If they have been improperly excluded from the action by the representative plaintiffs, they may, no doubt, before the verdict of the jury, apply to be named as parties to benefit, or possibly they may have some legal or equitable remedy against the representative plaintiff. After verdict they have no possible claim against the defendant. Nor can the defendant assert their existence to influence the jury's decision as to damages. The altruistic tortfeasor who says to the jury, "The present persons may have been injured, but I have injured others who are not before you. They are not here, and I cannot give particulars of their loss, but you must please take them into account," has never yet appeared in the courts in such an action.

The rights and liabilities under the Employers' Liability Act, 1880, appear to be precisely the same in this respect, with the exception that the compensation recoverable from the employer is subject to a statutory limit. The statute creates no special causes of action for either the workman, his representatives, or his injured dependants. It provides that they shall have the same rights and remedies as those they would have had but for the doctrine of common employment. In case of death, this means at that time that their remedies are defined by the Fatal Accidents Acts. There can be only one action, the claimants must be named in the plaint. The jury or the judge must assess the damages for each party for whom, and for whose benefit, the action shall be brought, subject now to the statutory maximum. There is, again, no room for the dependant who is not in the above sense a party to the action.

No doubt, both in actions under Lord Campbell's Act and in actions under the Employers' Liability Act, a judge may interest himself to see whether there are other dependants outstanding, and what are the reasons for their absence. I can imagine that he might think fit to adjourn the proceedings for further inquiries to be made. His jurisdiction, however, is confined to assessing damages for the people in fact before him, and I can see no ground under the Employers' Liability Act for assessing damages on any footing other than that he has to consider only the parties in fact before him. On the four actions, therefore, I come to the conclusion that the county court judge was correct in his procedure, and that his judgments should not be disturbed.

The position under the Workmen's Compensation Act seems to me to be identical with that with which I have been dealing. The Act in case of the death of a workman caused within its provisions gives a right to compensation to the dependent members of the workman's family. The class from which the dependants may come is larger than under the Fatal Accidents Acts, as it includes brothers and sisters, Rule 4 of the Workmen's Compensation Act seems to make the matter plain. The application under the Act must state particulars as to the dependant on whose behalf the application is made, while, if there is any conflict of interest between the dependants, or if any dependants neglect or refuse to join in the application, they may be named as respondents. This rule appears to me to adopt a procedure closely analogous to that under the Fatal Accidents Act. The claiming dependants must be named. The judge is given notice that there are or may be other dependants. It seems to me very clear, however, that, if the dependants named as respondents continue at the hearing to neglect or refuse to join in the application, the judge's duty is to ignore them, and to distribute amongst those who do make the application the lump sum compensation available in accordance with the provisions of the Act. I can see no reason at all for thinking that the judge should in any way take into account the claims of persons who neglect or refuse to apply for compensation. In the present case, the widows did not claim because they had elected to claim independently of the Act, and were deprived by sect. 29 of the right to claim. I doubt whether, in the circumstances, they can be said to have neglected or refused to join in the application—words which may be thought to apply only to those who otherwise would have a lawful claim. In any case, the judge was made fully aware in each proceeding of the existence of the widow. Indeed, he had already dealt with her case under the Employers' Liability Act actions, and no objection based upon the widow not being named as respondent could have any substance. As the widows were not applicants, the judge was only doing his duty in ignoring them when awarding compensation amongst those who were applicants.

I think that an administrative difficulty may arise where the widow, not an original applicant under the Workmen's Compensation Acts, claims independently, but fails in her action, or may fail on appeal, and yet seeks to recover compensation from the court or appellate tribunal under sect. 29 (2). Where there is such an independent claim, it may be proper for the judge in the compensation arbitration to withhold final apportionment of the lump sum until the proceedings have ended. No such problem, of course, arises in the present case. Another problem that was suggested during argument was whether, when the widow was claiming independently, she should be taken into account when assessing the total lump sum under the provisions of r. 8. I incline to think that those provisions relate only to dependants who are in fact claimants, but the matter does not arise in the present case, and I express no considered opinion about it. On the whole case, it appears to me that the county court judge, in a rather complicated set of circumstances, has steered a course correct in every particular, and that his judgments and awards should be restored, and this appeal be allowed.

LORD RUSSELL OF KILLOWEN: My Lords, I have had the opportunity of reading and considering the opinions of my noble and learned friends LORD ATKIN and LORD MACMILLAN, and I agree with their reasoning and conclusions. I cannot find anything in the language used by the legislature which would justify us in holding that the persons who elect to enforce their rights under one, rather than under the other, of the relevant statutes are not entitled to recover up to the maximum permitted by the statute of their choice. I agree that the appeals should be allowed.

LORD MACMILLAN: My Lords, there can, I think, be little doubt that the general policy of the law has been that all claims for compensation in respect of an accident to an individual should be enforced in a single action. Where the injured party survives, this is so by the nature of things, for the title to sue is in him alone, but when the accident is a fatal one, and the deceased is survived by a number of persons whom the law recognises as entitled to compensation, it is obvious that, if the party at fault is not to be exposed to a multiplicity of actions, some rule must be laid down to prevent this possibility.

In Scotland, to which Lord Campbell's Act does not apply, there has always been at common law a right to compensation on the part of a limited class of the deceased's relatives enforceable against the party whose negligence has caused the fatal accident. However, as LORD WATSON pointed out in this House in *Darling* v. *Gray & Sons* (2), at pp. 32, 33:

> There is not a single instance in which the court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognised they must bring one suit, and one only, in which the damages due to them respectively might be assessed.

In a subsequent case in which the rule was applied—*Pollok* v. *Workman* (3)—LORD JUSTICE-CLERK MACDONALD observed, at p. 356:

> there ought to be no difficulty in finding out what persons are entitled to put

forward a claim of this sort, and either getting them to join as parties to the cause, or if they refuse to join—thinking the action untenable, or for some other reason—proving their having done so, so that their claims may be excluded ever after.

When in England, in 1846, Lord Campbell's "Act for compensating the families of persons killed by accidents" for the first time rendered liable to an action of damages the wrongdoer whose wrongful act, A neglect or default had caused the death of another person, the possibility of a multiplicity of actions was precluded by express enactment, as in Scotland it had been prevented by the common law. Thus sect. 3 provides that:

> not more than one action shall lie for and in respect of the same subject-matter of B complaint.

Every such action is to be "for the benefit of the wife, husband, parent and child" (as expanded by interpretation in sect. 5) of the deceased, and is to be brought by and in the name of the deceased's executor or administrator. The jury are to give such damages as they may think C proportioned to the injury resulting from the death to the parties respectively, and by their verdict are to divide the amount so recovered amongst the parties (sect. 2). By sect. 4 the plaintiff is required to furnish full particulars to the defendant of the person or persons on whose behalf the action is brought.

D

The amending Act of 1864 merely provided that, if there were no executor or administrator of the deceased, or if the executor or administrator did not bring an action within six months after the death, then an action might be brought

> in the name or names of all or any of the persons (if more than one) for whose benefit E such action would have been, if . . . brought by . . . such executor or administrator

—and that every action so to be brought should be for the benefit of the same persons as if it were brought by the executor or administrator. It still remained imperative that there should be one action, and one action only. F

In stating in general terms that the action is to be for the benefit of certain designated relatives of the deceased, the statute might seem to have overlooked that some of them might not desire to make any claim, or might not have suffered any injury by the deceased's death. It sufficiently appears, however, from the subsequent language of the G statute that the jury are to be concerned only with those who have suffered injury resulting from the death, and whose claims are before the jury for adjudication. It seems to have been assumed that the plaintiff, in furnishing particulars of those on whose behalf the action was brought, would include the names of all those who had suffered injury by the death H and desired to have their claims put forward, for no provision is made for the possible omission, wilful or negligent, of the name of a relative entitled to claim and desirous of claiming. However that may be, it is, I think, plain that the jury can deal only with the cases of those who are mentioned in the particulars, and whose claims are brought before them by the plaintiff, or who are themselves plaintiffs. The damages which the jury are to give are to be such as they may think proportioned to the injury resulting from the death to the parties respectively, and the jury clearly cannot assess and apportion damages due to parties who are not before them, and whose claims have not been A the subject of evidence. It was settled in *Pym* v. *Great Northern Ry. Co.* (4) that the remedy given by the statute is to individuals, not to a class, but it still remains essential that one action only shall be brought, and, if any individual who has a claim is not either a plaintiff or mentioned in the particulars as a person on whose behalf the action is brought, B so much the worse for that individual. He cannot bring a second action against the wrongdoer.

The Employers' Liability Act, 1880 (which applies to Scotland), in doing away with the defence of common employment in certain instances, did not affect the requirement that there should be only one action, C but it introduced a statutory maximum of compensation—namely, three years' estimated earnings—which applies as well to cases brought by the injured workman himself as to cases brought by his legal personal representatives and any persons entitled in the case of death. Before the imposition of a statutory maximum, the jury assessed the full amount D of damages proportioned to the injury suffered by each of the claimants before them. The effect of imposing a statutory maximum was merely to require them to make their apportionment of damages within that maximum. If the claims proved to the satisfaction of the jury, when added together, do not exceed the statutory maximum, the claimants E will receive their awards in full. If they do exceed the maximum, they must be scaled down so as to keep within the maximum.

In the present case of the appellant, Mrs. Avery, she sued alone, and she declared that she brought her action on behalf of herself alone. The statute entitled her to do so. She proved that she had suffered injury F by reason of her husband's death to an amount at least equal to the maximum allowed by the 1880 Act. I can see no reason why she should not have judgment for the damages which she proved herself to have sustained. It is true that her daughter had a claim which Mrs. Avery ignored, but the statute did not require her either to join her daughter G as a plaintiff or to declare that she brought the action on behalf of her daughter as well as on her own behalf. The court had only Mrs. Avery's claim before it, and was competent to award her the full amount of damages which she established up to the statutory maximum. What remedy, if any, the daughter might have against her mother for not H including her claim I do not find it necessary to consider. The daughter at any rate could not bring another action against the defendants.

When the workmen's compensation legislation was introduced in 1897, an entirely new chapter was opened. New grounds of liability were created and new claimants were admitted. I think that it was still within the contemplation of the legislature, however, that, in respect of one accident to an individual workman, there should be one set of proceedings, and one only. The remedies provided by the new Act were, I think, intended to be alternative to, and not cumulative with, other remedies. Where the workman is not fatally injured, and the compensation under the Workmen's Compensation Act is recoverable by himself, this is plainly so. The Workmen's Compensation Act, A 1925, s. 29 (1), provides :

> . . . the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . .

The injured workman has an option to claim compensation under the B Act or to take proceedings independently of the Act, but he cannot do both.

Nevertheless, if the accident is a fatal one, difficulties present themselves. Sect. 48 (3) of the 1925 Act provides that :

> any reference to a workman who has been injured shall, where the workman is C dead, include a reference to his legal personal representative, or to his dependants, or other person to whom or for whose benefit compensation is payable.

As in the case of actions under Lord Campbell's Act, so in the case of proceedings under the Workmen's Compensation Act, I think that it was contemplated that there should be only one application for compensation, whatever the number of persons having claims. Thus the Workmen's D Compensation Rules, 1926, require that all persons " whose presence at the arbitration may be necessary to enable the judge or arbitrator effectively and completely to adjudicate upon all questions involved " shall be parties, either as applicants or as respondents : see rr. 2, 3, 4. In the case of *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon* (*or* E *Waddell*) (1), which was a Scottish appeal, this House held, however, that, where a workman has been fatally injured, the right to compensation under the Act vests in his dependants, not as a body, but as individuals, and that arbitration proceedings taken by a dependant step-son of a deceased workman against his employers were no barrier F under sect. 29 (1) to a common law action against them by his widow. The option under sect. 29 (1) is thus personal to each dependant of a deceased workman, and consequently there may arise out of one and the same accident concurrently proceedings under the Workmen's Compensation Act and proceedings independent of that Act, brought G by different dependants of the deceased workman. The principle of one accident, one action, is gone.

I am bound to say that I doubt if this was intended by the legislature. The language of sect. 29 (1) suggests the contrary. However, the effect of the subsequent interpretation section in requiring every reference H in the Act to a workman to include, where the workman is dead, a reference to his dependants, as construed in this House, is undoubtedly to permit duplication of proceedings.

This is what has happened in the present series of cases. It was no doubt their anxiety to avoid the anomalous consequences which may result from concurrent proceedings under the Workmen's Compensation Act and under Lord Campbell's Act which induced the judges of the Court of Appeal to devise the ingenious expedient which they have embodied in their judgment. With all respect, however, I cannot find any legal justification for it. I do not see any warrant for limiting A the independent rights of Mrs. Avery and her daughter in the independent proceedings which they have chosen to bring. Mrs. Avery brings her action under Lord Campbell's Act and proves that she has suffered injury by the death of her husband to at least the extent of the maximum of three years' estimated earnings which the Employers' Liability Act B allows. Why should she not have judgment accordingly? Her daughter, as the law permits her to do, initiates independent proceedings under the Workmen's Compensation Act, and is found entitled to compensation within the maximum prescribed by sect. 8 of the Act. Why should it not be awarded to her? To these questions I can see no answer, C nor to the similar questions which may be asked in the cases of all the other appellants. I therefore agree with your Lordships that the appeals should be allowed, the cross-appeals dismissed, and the judgments of the county court judge restored.

While this must be our decision, I do not fail to observe the difficulties D which may lie in store in view of the departure from the principle of one accident, one action, which has now been sanctioned. If one dependant proceeds under the Workmen's Compensation Act and obtains the maximum permissible compensation, and another dependant, who has elected to proceed independently of that Act, fails in his action, E and recurs under sect. 29 (2) to his right under the Workmen's Compensation Act, how is his claim to be met? Anomalies suggest themselves also in the calculation of the maximum lump sum under sect. 8. Suppose the workman leaves one or more dependent children under fifteen, who elect to proceed independently of the Act, and a widow, who claims F under the Act. Is the permissible award to include a children's allowance, and is the aggregate maximum to be £600? Again, if all the dependants who were wholly dependent on the deceased workman's earnings elect to proceed independently of the Act, and a partial dependant proceeds under the Workmen's Compensation Act, does the statutory maximum G of £300 under sect. 8 (2) (i) apply? Can the same accident involve the employers in liability up to £600 under the Workmen's Compensation Act, and up to three years' earnings under Lord Campbell's Act and the Employers' Liability Act, or possibly an indefinite sum at common law? It is considerations such as these which cause me to doubt whether H the legislature had in view the situation which the present cases illustrate. However, it is for the legislature rather than for your Lordships to supply the remedy for such anomalies, and the Court of Appeal's attempt to do so must be pronounced ineffectual.

LORD ATKIN: My Lords, I am asked by my noble and learned friend LORD THANKERTON to say that he concurs in the opinion which I have delivered.

Appeals allowed with costs. Cross-appeals dismissed and judgments of county court judge restored.

Solicitors: *Pattinson & Brewer* (for the appellants); *I. B. Pritchard* (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

plied. ASKEY *v.* GOLDEN WINE
., LTD. [1948] 2 All E.R. 35.

BERESFORD *v.* ROYAL INSURANCE CO., LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Macmillan), **March 10, 11, 14, 15, May 9, 1938.]**

Insurance—Life insurance—Exception—Suicide "within one year from commencement of insurance"—Suicide nine years after issue—Public policy.

By a condition in an insurance policy issued in 1925, it was provided that: "If the life assured shall die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof." The premiums were regularly paid upon the policy until 1934, when the assured committed suicide. It was found as a fact by a jury that the assured was sane at the time of his death:—

HELD: although the condition in the policy necessarily implied a positive undertaking by the company to pay if the assured died by his own hand, sane or insane, after the expiry of a year from the commencement of the insurance, it was contrary to public policy that either a person who had committed a crime or his personal representative should be allowed to benefit by that crime. In the circumstances, therefore, the contract was unenforceable.

Order of Court of Appeal ([1937] 2 All E.R. 243) *affirmed.*

[EDITORIAL NOTE. In this case there is a conflict between two grounds of public policy. The first is the duty of the court to enforce contracts and the other that no man or his estate is allowed to benefit by his own crime, or, as it may be more aptly put here, no man is allowed to insure himself against the commission of a crime. In the court of first instance SWIFT, J., held that sanctity of contract is of paramount importance. The Court of Appeal held that it is the over-riding duty and inherent power of the court to refuse its aid to enforce a promise where the plaintiff has to set up his own crime or the estate of a deceased seeks to benefit from a crime of the deceased. The House of Lords have upheld the Court of Appeal.

AS TO DEATH DUE TO ASSURED'S CRIMINAL ACT, see HALSBURY, Hailsham Edn., Vol. 18, pp. 519, 520, para. 817; and FOR CASES, see DIGEST, Vol. 29, pp. 366-369, Nos. 2945-2967.]

Cases referred to:

(1) *Cleaver* v. *Mutual Reserve Fund Life Assocn.*, [1892] 1 Q.B. 147; 29 Digest 369, *2969*; 61 L.J.Q.B. 128; 66 L.T. 220.

(2) *Amicable Society* v. *Bolland* (1830), 4 Bli. N.S. 194; 29 Digest 369, *2968*; *revsg.* S.C. *sub nom. Bolland* v. *Disney* (1827), 3 Russ. 351.

(3) *Moore* v. *Woolsey* (1854), 4 E. & B. 243; 29 Digest 368, *2959*; 24 L.J.Q.B. 40; 24 L.T.O.S. 155.

(4) *In the Estate of Crippen*, [1911] P. 108; 23 Digest 167, *1834*; 80 L.J.P. 47; 104 L.T. 224.

(5) *In the Estate of Hall, Hall* v. *Knight & Baxter*, [1914] P. 1; 23 Digest 115, *1102*; 83 L.J.P. 1; 109 L.T. 587.

(6) *R.* v. *Mann*, [1914] 2 K.B. 107; 15 Digest 814, *8863*; 83 L.J.K.B. 648; 110 L.T. 781.

(7) *Northwestern Mutual Life Insurance Co.* v. *Johnson* (1920), 254 U.S. 96.

A (8) *Fender* v. *Mildmay*, [1938] A.C. 1; [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340.

APPEAL from an order of the Court of Appeal (LORD WRIGHT, M.R., ROMER and SCOTT, L.JJ.), dated Mar. 22, 1937, and reported in [1937] 2 All E.R. 243, reversing a judgment of SWIFT, J., dated July 13, 1936, B and reported in [1936] 2 All E.R. 1052, whereby it was ordered that judgment be entered for the plaintiff (the present appellant) for £46,769 with costs. The facts and the arguments are set out in the opinions.

Sir William Jowitt, K.C., and *A. T. Denning, K.C.*, for the appellants.

Roland Oliver, K.C., *Harold Murphy, K.C.*, and *E. Ryder Richardson* C for the respondents.

LORD ATKIN: My Lords, this is an appeal from an order of the Court of Appeal, who reversed a decision of the late SWIFT, J., in favour of the plaintiff and entered judgment for the defendants. The action D was brought by the administratrix with the will annexed of the estate of Charles Rowlandson to recover the sum of £50,000 said to be due under five policies issued to him by the defendants. The only relevant defence pleaded was that the deceased died by his own hand, whereby the policies became void. It is unnecessary to state in detail the melancholy facts E of the death of the assured, Major Rowlandson. It is sufficient to say that, since June, 1925, he had been maintaining five policies on his life for £50,000, in respect of which the premiums payable quarterly amounted to about £450. In June, 1934, he was insolvent. He had borrowed over £60,000—over £40,000 from personal friends—to finance an inven- F tion for hardening steel, which had been unsuccessful. In addition, he had borrowed from the respondents, on the security of the policies, the sum of £6,791. The policies at this date had no surrender value above the amount advanced, and he was unable to pay the premium. At a series of interviews with the representative of the defendants, he obtained G extensions of time for payment of the premium. The last and final extension was to 3 p.m. on Aug. 3. At about 2.57 p.m. on that day he shot himself. Letters and interviews on that day made it clear that he shot himself for the purpose of the policy moneys being made available for the payment of his debts. The action was tried by SWIFT, J., and a H special jury. The jury, by consent of counsel, were only asked to decide the question whether the assured was sane when he took his life. They answered this question in the affirmative. A question had been raised at the trial as to whether the test of insanity in such a case was the well-known test negativing criminal responsibility or something different. The jury negatived insanity in either of the forms put to them, and the question is no longer relevant in these proceedings. Though the defendants had not pleaded public policy, they raised that contention in the course of argument. It was in any case, in my opinion, a matter which the judge would be bound to discuss and determine on his own initiative Swift, J., came to the conclusion that the rules of public policy did not prevent the plaintiff from recovering, and entered judgment for the plaintiff. The Court of Appeal held that it was contrary to public policy for the plaintiff to be entitled to enforce the contract, and entered judgment for the defendants.

In discussing the important subject of the effect of suicide on policies of life insurance, it is necessary to distinguish between two different questions that are apt to be confused : (i) What was the contract made by the parties ? (ii) How is that contract affected by public policy ?

(i) On the first question, if there is no express reference to suicide in the policy, two results follow. In the first place, intentional suicide by a man of sound mind, which I will call sane suicide, ignoring the important question of the test of sanity, will prevent the representatives of the assured from recovering. On ordinary principles of insurance law, an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening. The fire assured cannot recover if he intentionally burns down his house, nor the marine assured if he scuttles his ship, nor the life assured if he deliberately ends his own life. This is not the result of public policy, but of the correct construction of the contract. In the second place, this doctrine obviously does not apply to insane suicide, if one premises that the insanity in question prevents the act from being in law the act of the assured.

On the other hand, the contract may, and often does, expressly deal with the event of suicide, and that whether sane or insane. It may provide that death arising at any time from suicide of either class is not covered by the policy. It may make the same stipulation in respect of suicide of either or both classes happening within a limited time from the inception of the policy. The rights given to the parties by the contract must be ascertained according to the ordinary rules of construction, and it is only after such ascertainment that the question of public policy arises. In the present case, the contract contained in the policy provided that the company would pay the sum assured to the person or persons to whom the same is payable upon proof of the happening of the event on which the sum assured was to become payable. It further provided that the policy was subject to the conditions and privileges indorsed, so far as applicable. It contained the further stipulation that, unless it was otherwise provided in the schedule, the policy, subject to the indorsed conditions, was indisputable. The schedule specified the assured as Charles Rowlandson, the life assured as the assured, the event on the happening of which the sum was to become payable as the death of the life assured, and the person or persons to whom the sum was payable as the executors, administrators or assigns of the assured. The only relevant condition is condition 4, which reads as follows :

> If the life . . . shall die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof, except that it shall remain in force to the extent to which a *bona fide* interest for pecuniary con- A sideration, or as a security for money, possessed or acquired by a third party before the date of such death, shall be established to the satisfaction of the directors.

My Lords, I entertain no doubt that, on the true construction of this contract, the insurance company have agreed with the assured to pay to his executors or assigns on his death the sum assured, if he dies by his B own hand, whether sane or insane, after the expiration of one year from the commencement of the assurance. The express protection limited to one year, and the clause as to the policy being indisputable subject to that limited exception, seem to make this conclusion inevitable. The respondents' counsel appeared shocked that it should be considered that C a reputable company could have intended to make such a contract, but the meaning is clear, and one may assume from what one knows of tariff conditions that it is a usual clause. There is no doubt, therefore, that, on the proper construction of this contract, the insurance company promised Major Rowlandson that, if he, in full possession of his senses, D intentionally killed himself, they would pay his executors or assigns the sum assured.

(ii) The contract between the parties has thus been ascertained. There now arises the question whether such a contract is enforceable in a court of law. In my opinion, it is not enforceable. The principle is E stated in the judgment of FRY, L.J., in *Cleaver* v. *Mutual Reserve Fund Life Assocn.* (1), at p. 156 :

> It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.

F The cases establishing this doctrine have been fully discussed by LORD WRIGHT, M.R., in his judgment in the present case. I mention some of them in order to call attention to the fact that, while, in the earlier cases, different reasons have been given for the rule, the principle can now be expressed in very general terms. In Fauntleroy's case, *Amicable Society* G v. *Bolland* (2), LORD LYNDHURST, L.C., refused to allow the assignees of a bankrupt who had committed forgery to recover the proceeds of a life insurance taken out by the forger who had been convicted and executed. He said at p. 211 :

> H Is it not void upon the plainest principles of public policy ? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes ? namely, the interest we have in the welfare and prosperity of our connexions ?

It may be of interest to note with regard to this famous case that LORD LYNDHURST, had, as Attorney-General, been leader for the prosecution at the trial of Fauntleroy. In this case, the ground given is the removal of a restraint against the commission of crime. In *Moore* v. *Woolsey* (3), the Court of Queen's Bench refused to hold void a condition that a policy on the life of a person who should die by his own hands would remain in force to the extent of any *bona fide* interest acquired as security for money. The assured had died by his own hand, but whether sane or insane did not appear. Lord Campbell, in deciding for the plaintiff, at p. 255, said that a stipulation that, if a man committed suicide within a year, the policy should give a right of action would be void. He appears to put it on the ground that it would offer an encouragement to suicide. In *Cleaver's* case (1), the executors of James Maybrick were suing on a life policy which he had effected in favour of his wife, who had been convicted of his murder. The objection that the executors were suing to enforce a trust in favour of the wife was got over by holding that the wife could get no benefit from her crime, but that, her interest failing, the executors could recover for the benefit of the testator's estate. It should be noticed that, on the principle stated, it is not a question of refusing to enforce a contract made by the criminal. The doctrine avoids a testamentary gift, and it would appear to be immaterial whether or not the criminal knows of the intended gift. If he does not know, the inducement to commit the crime, and the removal of the restraint against committing the crime, both tend to disappear as supports for the doctrine. In *Crippen's* case (4), the question arose as to whether administration of the estate of a deceased wife who had been murdered by her husband should be granted to the next of kin of the wife, passing over the legal personal representative of the husband. Sir Samuel Evans, P., decided in favour of the wife's next of kin, and said at p. 112:

> It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.

Finally, in *In the Estate of Hall, Hall* v. *Knight & Baxter* (5), the court decided that a woman who had killed a testator in circumstances that amounted to manslaughter, but not, it would appear, to manslaughter by negligence, could not be allowed to claim probate as a legatee under the will of the testator. Swinfen Eady, L.J., said at p. 8:

> . . . the estate of the testator must go in the same way as if there were no benefit given to Jean Baxter by the will and that she cannot in any way benefit from the crime which she has committed. I see no reason for restricting the rule to cases of murder.

Lord Sumner, then Hamilton, L.J., said at p. 7:

> The principle can only be expressed in that wide form. It is that a man shall not slay his benefactor and thereby take his bounty. . . .

It may be remarked that this pithy statement, while applicable to the case under discussion, is not as wide as the principle permits. It would not be apt to decide a claim under a contract where the criminal may have given full consideration, and could hardly be said to be "taking

bounty from a benefactor." I think that the principle is that a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime, whether under a contract or under a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime, or remove a restraint to crime, and that
A its effect is to act as a deterrent to crime, but, apart from these considerations, the absolute rule is that the courts will not recognise a benefit accruing to a criminal from his crime.

The application of this principle to the present case is not difficult. Deliberate suicide, *felo de se*, is, and always has been, regarded in English
B law as a crime, though by the very nature of it the offender escapes personal punishment. Indeed, SIR JOHN JERVIS in the first edition of his book on CORONERS said [cited 7th Edn., p. 186]:

> Self-murder is wisely and religiously considered by the English law as the most heinous description of felonious homicide.

C The coroner's inquisition, as LORD WRIGHT, M.R., points out, formerly recorded "*felonice se murderavit*", now records, by the Coroners' Rules, 1927, "the said C.D. did feloniously kill himself." The suicide is a felon. On the inquisition his goods were forfeited (though apparently not his lands). By English law, a survivor who has agreed with him to commit
D suicide with him is guilty of murder, and the attempt to commit suicide is an attempt to commit a felony, and punishable accordingly: *R.* v. *Mann* (6). The remaining question is whether the principle applies where the criminal is dead and his personal representative is seeking to recover a benefit which takes shape only after his death. It must be
E remembered that the money becomes due, if at all, under an agreement made by the deceased during his life for the express purpose of benefiting his estate after his death. During his life, he had power of complete testamentary disposition over it. I cannot think the principle of public policy to be so narrow as not to include the increase of the criminal's
F estate amongst the benefits of which he is deprived by his crime. His executor or administrator claims as his representative, and, as his representative, falls under the same ban.

Anxiety is naturally aroused by the thought that this principle may be invoked so as to destroy the security given to lenders and others by
G policies of life insurance, which are in daily use for that purpose. The question does not directly arise, and I do not think that anything said in this case can be authoritative. I consider myself free, however, to say that I cannot see that there is any objection to an assignee for value before the suicide enforcing a policy which contains an express promise
H to pay upon sane suicide—at any rate, so far as the payment is to extend to the actual interest of the assignee. It is plain that a lender may himself insure the life of the borrower against sane suicide, and the assignee of the policy is in a similar position, so far as public policy is concerned. I have little doubt that after this decision the life companies will frame a clause which is unobjectionable, and they will have the

support of the decision of the Court of Queen's Bench in *Moore* v. *Woolsey* (3), where a clause protecting *bona fide* interests was upheld. It was suggested to us that, so far as the doctrine was applied to contracts, it would have the effect of making the whole contract illegal. I think that the simple answer is that this is a contract to pay on an event which may happen from many causes, one only of which involves a crime A by the assured. The cause is severable, and the contract, apart from the criminal cause, is perfectly valid.

I do not deal with the United States cases, which have been discussed sufficiently by LORD WRIGHT, M.R. I attach much importance to uniformity of result in the courts of the two countries in matters of such B strong mutual interest as the law of insurance, but questions of public policy must develop nationally, and it would be unreasonable to expect identity of outlook in the courts of all countries. I cannot forbear, however, to mention the case of *Northwestern Mutual Life Insurance Co.* v. *Johnson* (7), for the reason that the judgment was given by C HOLMES, J., a name always to be received with veneration by an English lawyer. The decision seems to me contrary to the general trend of United States decisions up to its date, and seems to be applicable only where a rule of public policy of the state whose law is the proper law governing the insurance policy cannot be ascertained. It contains no D discussion of the rule of public policy that could be applied, except that the promise to pay may evoke a possible motive for self-slaughter. In reference to such a ground, the judgment points out that the motive is no stronger than is the motive for murder where an insurance is taken out on the life of a third party. From that point of view, I think that E the criticism is just, and I am glad to find support in it for the view I recently expressed in *Fender* v. *Mildmay* (8), at p. 13, where I suggested that, for tendency to play a part in public policy, it must be in a case where the parties generally, or in a considerable number of cases, will be exposed to a real temptation, and where it is likely that they will yield F to it. As has already been pointed out in this judgment, the principle of public policy applied in these courts goes far beyond the supposed motive for self-slaughter. For the reason I have given, I think that this contract is, in the circumstances, unenforceable. I agree with the judgment of the Court of Appeal, and am of opinion that this appeal G should be dismissed with costs.

My Lords, I am asked to say that my noble and learned friend LORD THANKERTON agrees with the opinion which I have just expressed.

LORD RUSSELL OF KILLOWEN: My Lords, I also agree. H

LORD MACMILLAN: My Lords, the respondent insurance company issued to the late Major Rowlandson a series of life policies whereby, in consideration of the payment by him of the stipulated premiums, they undertook to pay certain sums of money to his executors, administrators or assigns in the event of his death. Each policy was declared, subject to the indorsed conditions, to be indisputable. The fourth indorsed condition is the only one material for the present purpose. I need not set it out, as it has just been read by my noble and learned friend LORD ATKIN.

A The stipulated premiums were paid for a number of years by the assured till, on Aug. 3, 1934, the event on the occurrence of which the respondents had undertaken to make payment—namely, the death of the assured—took place. Inasmuch as his death did not occur within one year from the commencement of the assurance, the fourth condition B of the policy is inapplicable, and it is not suggested that any other condition avoiding or affecting the respondents' liability applies. The respondents are, accordingly, by the terms of their contracts incontestably under obligation to pay the policy moneys to the appellant, as the assured's administratrix, under deduction of certain sums advanced by C the respondents to the assured. The respondents, however, maintain that it would be contrary to public policy that a court of law should order them to fulfil their contracts, on the ground that the assured, as is the fact, died by his own hand while sane.

My Lords, on the question of the construction of the contracts, I have D no difficulty. If the policies had contained no reference at all to suicide, I should have been of opinion that they did not cover the contingency of the assured committing suicide while sane, or, in other words, that the event of the assured's death did not mean or include the event of his self-caused death while sane. The policies, however, do contain an express E reference to the contingency of suicide in the fourth condition, which avoids the policies in the event of the assured dying by his own hand, whether sane or insane, within one year from the commencement of the assurance. This condition, as I read it, is a pregnant condition. Coupled with the declaration of indisputability, I think that it necessarily F implies a positive undertaking to pay if the assured dies by his own hand, sane or insane, after the expiry of a year from the commencement of the assurance.

The question therefore is whether it is contrary to public policy for a court of law to enforce a contractual undertaking by an assurance G company to pay a sum of money to an assured's representatives in the event of his dying by his own hand while sane after the expiry of a year from the commencement of the assurance. My Lords, I confess that I found this question a difficult one. I need not rehearse the emphatic reminders contained in the opinions of the noble and learned Lords who H were in the majority in the recent case of *Fender* v. *Mildmay* (8) on the subject of the dangers which attend the application of considerations of public policy to contracts deliberately undertaken by persons of full age. The first question must always be : what is the principle of public policy which would be infringed by the enforcement of the contract ? In the present instance, the principle which, it is said, would be infringed is the principle that no court ought to assist a criminal to derive benefit from his crime. It has also been put in this form—that no court ought to enforce stipulations tending to induce the commission of a crime. That there are such principles of public policy, to which the courts ought to give effect, I do not doubt. In the present case, would the enforcement of the respondents' obligation enable a criminal to take benefit from his crime? Or can it be said that the obligation now sought to be enforced was one which held out an inducement to commit a crime, to wit, the crime of *felo de se*?

It was certainly not the desire or intention of the respondents, in framing their policies as they did, to offer any inducement to the commission of the crime of suicide. It was directly contrary to their interest that the assured should commit suicide and bring their obligation prematurely into operation. The respondents did not agree to pay the policy moneys in consideration of the assured committing suicide, which would plainly have been a *turpis causa*, but in consideration of the assured making payment of the stipulated premiums, and, the longer he lived and paid these premiums, the better for the respondents. The event of his suicide, although they undertook to pay on its occurrence, was certainly not an event which the respondents desired to induce the assured to bring about. By providing that they would not pay if the assured committed suicide within a year of the commencement of the assurance, the respondents provided some safeguard against the assured taking out a policy with a view to suicide, for few suicides can be so provident as to plan the commission of the act more than a year ahead.

Moreover, it is plain that the benefit of the crime, in the sense of receiving the policy moneys, could never be enjoyed by the assured, for it is a condition of the benefit that it shall not accrue till after his death. There is obviously much less inducement to commit a crime in order to benefit others than to commit it in order to benefit oneself. The instinct of self-preservation may be said to provide a stronger motive against suicide than the desire to benefit relatives or creditors can be said to provide a motive to commit suicide, though it was no doubt true in Major Rowlandson's case that the benefit to be derived by his creditors from his death influenced him in taking his own life. If the plea of public policy is sustained in this case, the remarkable result will ensue that the respondents, who are said to have provided the assured with the inducement to commit a crime, will be the only persons to benefit by its commission, for they will retain the premiums paid by the assured, without any liability to fulfil the obligation in consideration of which they received them.

There may truly be said to be a conflict of principles of public policy involved, for it is undeniably a principle of public policy that persons who enter into contractual engagements should be required to fulfil them. It is of the first importance, in particular, that policies of life assurance, which are among the most useful instruments of credit, should not be subject to any contingent invalidity, and the present form of clause was no doubt adopted by the respondents, an eminently reputable company, and presumably by other equally reputable companies, solely with a view to rendering their policies attractive by reason of their stipulated incontestability.

A Finally, there is the decision of the Supreme Court of the United States in *Northwestern Mutual Life Insurance Co.* v. *Johnson* (7), where payment was enforced in the case of a suicide under a policy containing a clause practically the same as the present clause, and the view that it was contrary to public policy to do so was negatived, a decision all the
B more striking in that it was contrary to the view previously entertained by that eminent court.

My Lords, I have accumulated these considerations in justification of the difficulty which I have experienced in concurring with your Lordships, and it is perhaps as well that I should have done so, in order that
C it may not be thought that any of them have been overlooked. After carefully weighing them, however, I do not find them, cogent as they are, sufficiently convincing to deter me from agreement with your Lordships' conclusion. I need not repeat the considerations leading to that conclusion, which have been so fully developed by my noble and learned
D friend LORD ATKIN and also in the Court of Appeal. I feel the force of the view that to increase the estate which a criminal leaves behind him is to benefit him. To enforce payment in favour of the assured's representative would be to give him a benefit, albeit in a sense a post-mortem benefit—namely, the benefit of having, by his last and criminal act,
E provided for his relatives or creditors. No criminal can be allowed to benefit in any way by his crime.

I return to the simple question: Ought the courts to enforce a contract to pay a sum of money to a person's representatives in the event of his committing *felo de se?* In my opinion, I am bound to answer this
F question in the negative, both on principle and, so far as the courts of this country are concerned, by authority. I should add that I desire to reserve my opinion as to the position of third parties who have *bona fide* acquired rights for value under such policies.

Appeal dismissed with costs.

G Solicitors: *Soames, Edwards & Jones* (for the appellant); *Sutton, Ommanney & Oliver* (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ROBSON *v.* SYKES.

[King's Bench Division (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **April 27, 1938.]**

Shipping—Seaman—Contract of service for commercial voyage—Refusal to load cargo of nitrate for war zone—Whether offence committed of combining to impede navigation of ship—Merchant Shipping Act, 1894 (c. 60), *s.* 225 (1) (*e*).

On Nov. 16, 1936 (*i.e.* after the outbreak of the civil war in Spain), a number of seamen signed articles as members of the crew of a registered British steamship for a foreign-going commercial voyage of not more than two years' duration, with certain geographical limits, which included all ports in Spain. On Feb. 19, 1937, the vessel reached Portland, where the master received orders to proceed to Hopewell and there load a cargo of nitrate for Seville. The crew refused to go to Hopewell for the purpose of loading nitrate for Spain, but agreed to sail the vessel to Boston, where the British consul was interviewed and was informed by the crew's spokesman that the crew refused to load the cargo for Spain, as Spain was a war zone, that the waters around Spain and the Spanish ports were at all material times dangerous to shipping, owing to the civil war, that Seville was an important base of the insurgent forces, and that a ship taking a cargo of nitrate to a Spanish port ran a grave risk of destruction or capture, while her crew were in danger of death or captivity. In consequence of their refusal to load the nitrate for Spain, the crew were discharged at Boston on Mar. 4. Thirteen members of the crew were thereupon charged, as seamen lawfully engaged to serve in a ship, with having combined to impede the navigation of the ship contrary to the Merchant Shipping Act, 1894, s. 225 (1) (*e*) :—

Held : the seamen were entitled to decline the voyage in the conditions which then subsisted, which exposed them to the risk of capture, and it was utterly impossible to find them guilty of a criminal offence.

[EDITORIAL NOTE. The facts of this case will probably recall the recent decision in *Compania Naviera Bachi* v. *Hosegood & Co.*, [1938] 2 All E.R. 189, but the facts in that case differed greatly from those in the present case. There the ship was a Spanish ship, and the trouble with the crew was due to an order by the Spanish government requisitioning the ship. Here the ship was a British one, and the real question was whether or not the articles into which the seamen entered contemplated a voyage to Spain at a time when that country was involved in a civil war. It will be noted that the geographical limits mentioned in the articles included Spain, but it is held that a voyage to a country at war was not within the contemplation of the parties at the time the contract for service was made.

As to Offences Against Discipline, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 60-62, paras. 109, 110 ; and for Cases, see DIGEST, Vol. 41, pp. 248-252, Nos. 885-936.]

Case referred to :

(1) *Palace Shipping Co., Ltd.* v. *Caine*, [1907] A.C. 386 ; 41 Digest 254, *956* ; 76 L.J.K.B. 1079 ; 97 L.T. 587 ; *affg.*, [1907] 1 K.B. 670.

Appeal by way of case stated against a decision of the recorder of Liverpool, sitting at Liverpool Quarter Sessions, whereby convictions by the stipendiary magistrate were quashed. The facts and the arguments are set out in the judgment of Lord Hewart, L.C.J.

D. P. Maxwell Fyfe, K.C., *Harvie Watt* and *A. H. Glenn Craske* for the respondent at quarter sessions and the present appellant.

D. N. Pritt, K.C., and *B. R. Rice-Jones* for the appellants at quarter sessions and the present respondents.

LORD HEWART, L.C.J. : This is a case stated by the recorder of the city of Liverpool, and it arises in the following way. Certain informations had been preferred by the present appellant under the Merchant Shipping Act, 1894, s. 225, against a number of seamen who had been engaged to serve in the Linaria. The charge against them was that on certain days in Feb., 1937, and Mar., 1937, they combined to impede the navigation of the ship, contrary to the provisions of the statute. The stipendiary in Liverpool, having heard the evidence, convicted the defendants, the present respondents, and imposed small fines. From that decision the seamen, who were the defendants, appealed to quarter sessions, and it was after hearing that appeal that the recorder gave judgment. He gave judgment which allowed the appeals with costs, and he has stated a case for the consideration of this court upon the matters which were raised :

> The question for the opinion of the court is whether, upon the above facts, I came to a correct determination and decision in law.

In my opinion, he did come to a correct determination and decision, and I am bound to add that it appears to me that, for the most part, the topics which were raised, as well in the police court as in the court of quarter sessions, were matters of pure fact.

The case finds a series of facts which may be very shortly summarised. The appellants at quarter sessions had signed articles in Nov., 1936, at Blyth, as members of the crew of the Linaria, a British ship owned by the Stag Line, Ltd. Those articles were signed for a foreign-going voyage of not more than two years' duration, and covered ports and places within the limit of 75° north and 60° south, which limit included all ports in Spain. The vessel in the course of her voyage called at a series of ports and ultimately, on Feb. 19, 1936, reached Portland. At Portland the master received orders to proceed to Hopewell, and there to load a cargo of nitrate for the port of Seville in Spain. The case finds that it was common ground that nitrate was not forbidden by the Merchant Shipping (Carriage of Munitions to Spain) Act, 1936, and that it could be used both as a fertiliser and as a component in high explosives. The case further finds that on Feb. 19, 1937, and at all material times, civil war was raging in Spain, and that both military and naval forces were employed by each contending party. More than that, neither party was recognised as a belligerent by the British government. On Feb. 19, information as to the order to proceed to Hopewell having leaked out, one of the crew informed the captain that, among others, these seamen refused to go to Hopewell for the purpose of loading nitrate for Spain, and the crew were never asked to take the ship to Hopewell except as part of a voyage to Spain. Afterwards, between Feb. 19 and Feb. 21, the captain received a resolution signed by the accused seamen, amongst others, in these terms:

> Realising that the boat Linaria is scheduled to sail from Hopewell with a cargo of nitrate for Seville, held by the Spanish Fascists, we vigorously protest against being made a party to the Fascists in their suppression of the people of Spain.

The ship arrived at Boston on Feb. 22, and afterwards the British Consul in Boston in the presence of the captain interviewed a deputation of the crew. To quote the words of the case:

> At these interviews Robson [the first-named appellant] informed the Consul and the captain that he and the other appellants were not going to load the cargo for Spain, as Spain was a war zone, that the waters around Spain and the Spanish ports were at all material times dangerous to shipping, that Seville was an important base of the insurgent forces, and that a ship taking a cargo of nitrate to a Spanish port ran a grave risk of destruction or capture, and her crew of death or captivity.

In the result, the accused were discharged before the Consul at Boston on Mar. 4.

The case continues by recording the sequel. It is found that on Mar. 7 the ship continued on her voyage to Hopewell, loaded a cargo of nitrate, and proceeded to Spain, discharging her cargo at Pasages. The case states:

> On such voyage the ship was stopped by a speed boat belonging to the Spanish government and a battleship belonging to the Spanish insurgents, but in both cases on announcing her cargo the Linaria was permitted on her way.

Such are the findings of fact in the case.

The main contention of the informant was that the accused had signed the articles on the Linaria at a time when civil war in Spain was already in existence, and that there was no evidence of any increase of risk between that time and the time of the alleged offences. The accused on their part contended that the master had no right to require them to go to Spain, as such a voyage would necessarily involve risks different from, and in excess of, those incidental to the employment of seamen engaged in an ordinary commercial voyage of a peaceful nature. More than that, they contended that the contemplated voyage was entirely beyond the scope of their agreement, and that they were therefore justified in refusing to go to Spain, which was the theatre of civil war. The recorder in substance accepted the contentions on the part of the accused. He delivered a careful judgment, which we have had the advantage of reading, and he came to this conclusion:

> I think the appellants [the accused] in this case had to make a difficult decision. I have no reason to doubt that they came to a decision in complete good faith. I have no doubt, and no reason to doubt, that they felt very strongly upon the matter, and, having heard the evidence for the prosecution in this case, I have come quite firmly to the conclusion that no case has been made out, and that the men, in refusing to make this voyage to Spain under the circumstances, were perfectly justified in their decision.

So holding, the recorder allowed the appeals with costs.

Mr. Maxwell Fyfe in his exhaustive argument has contended that that decision is wrong. The Merchant Shipping Act, 1894, s. 225, provides that, if a seaman lawfully engaged commits certain offences, he shall be liable to be punished. He may, indeed, be imprisoned, with or without hard labour. One of the possible offences specified is if he combines with any of the crew to impede the navigation of a ship. Mr. Maxwell Fyfe has contended that here there was an unlawful combination to impede the navigation of the ship, that the seamen took it upon themselves to decide whether or not it was proper and expedient that the vessel should make a certain voyage, and, in breach of the articles which they had signed, refused to continue their employment.

I think that this case is curiously like *Palace Shipping Co., Ltd.* v. *Caine* (1). There are certain short passages, and short passages only, to which I should like to refer. Lord Loreburn, L.C., having referred to the facts of that case, a case in which it was held that the men were justified in refusing to go to Japan at the risk of capture and its consequences, said, at p. 391 :

> It is nothing short of preposterous to expect that seamen in a strange port shall speculate on the movements of belligerent war vessels, and nicely weigh the chances of capture.

Lord James of Hereford said, at p. 394 :

> In determining what amounts to a justification for seamen refusing to proceed to sea, I do not think that they are called upon to prove by positive and legal evidence that there was an actual probability of capture ; their decision has to be formed upon such general information as is at the moment at their disposal. Doubtless their decision must not be based on merely arbitrary grounds. Good faith is a necessary element, and such good faith would not exist unless some reasonable grounds for the refusal can be alleged.

Finally, Lord Atkinson used these words, at p. 396 :

> It is, I think, equally clear that this risk of capture is not one of the risks ordinarily attending a commercial voyage or adventure of a peaceful nature. The risk of capture may be so remote as to leave the character of such a voyage practically unchanged, or so proximate and imminent as to entirely change its character. It must be a question of degree to be determined in each case on its own special facts ; but it would certainly appear to me that a voyage with a contraband cargo, across seas which are admittedly the theatre of war, to a port belonging to one of the belligerents which is itself a naval base, and therefore likely to be the object of such surveillance and attack as the other belligerent is able to subject it to, or direct against it, is *prima facie* not an ordinary commercial voyage of a peaceful nature. It was, however, for an ordinary commercial voyage of a peaceful nature that the crew in this case engaged to serve. And, in my opinion, the burden of rebutting the *prima facie* presumption above mentioned, and establishing that the risk of capture was so remote that the character of the voyage remained practically unchanged from that which the crew supposed it to be when they signed the articles, rested upon the owners of the ship or their agent, the master.

Undoubtedly the facts of that case are, in various respects, different from the facts in this case, but they are the same, in my opinion, in the fundamental respect that the seamen here contended that, in view of the events which had happened, they were entitled to decline to proceed with the voyage which was pointed out to them. They had signed articles in Nov., 1936. The ship had voyaged to a series of ports, Piræus, Istambul and elsewhere, and had made her way across to Boston. It is quite true that, when one looks at the articles, the geographical limits within which a voyage was contemplated as possible included a part, at any rate, of Spain, but, as matters then stood, when the crew were invited in effect to take a cargo of nitrate to a portion of a country where war was raging, in view of the events which had happened, I think that it was open to these seamen to contend that what was indicated to them as necessary to be done was something outside the scope of the bargain into which they had entered. I think that it would not have been possible, in these circumstances, to find these men guilty of a criminal offence, and, indeed, if the matter had been purely a matter of liability, no question of crime or offence being involved, I should have thought that there was no good ground for holding that there had been on their part a breach of contract. I entirely agree with the conclusion to which the recorder of Liverpool came, and I think that the present appeal ought to be dismissed.

BRANSON, J.: I agree, and I should like to add just a word or two as to the facts of the particular case. I agree entirely with the judgment of LORD HEWART, L.C.J., that the question depends upon whether or not the crew were justified in refusing to carry this nitrate to a port in Spain by reason of the change in the type of the voyage which they were being asked to undertake. In my view, the decision of the House of Lords in the *Palace Shipping Co., Ltd.* v. *Caine* (1) shows that, apart from special circumstances, a crew signing articles in the ordinary form must be taken to have engaged themselves to carry out an ordinary commercial voyage. The question as to whether the voyage which they were being asked to perform fell within that description was one of fact, to be decided by the tribunal of fact. The recorder has decided that it did not, and, as it seems to me, there was ample evidence upon which he could so decide. One of the reasons put forward by the crew in the resolution of Nov. 19 or Nov. 21, referred to in para. 6 (1) of the case, indicated that the crew were animated, in their refusal to go to Spain, by some political consideration, by some preference for one side or the other in the contest that was raging in Spain. Had that been the only ground put forward, it would, in my view, have been a quite irrelevant ground, and no justification for the refusal of the crew at all. In the reasons given in para. 6 (*o*), however, one finds reasons which, according to the decision of the House of Lords, afford an ample justification for the refusal of the crew to proceed, and for these reasons I agree with the judgment of LORD HEWART, L.C.J.

HUMPHREYS, J.: I am of the same opinion. The question which is asked in this court in this case stated by the recorder of Liverpool is whether, upon the facts as stated, "I came to a correct determination and decision in law." The question, as appears from the judgment of the recorder, which he regarded as the real question in the case, is put by him in this way:

> Had they [the seamen] a right to refuse to go on the ground that it was something outside the scope of their original agreement?

Those words are very similar to the language used by LORD MACNAGHTEN in the *Palace Shipping Company* case (1), to which LORD HEWART, L.C.J., has referred. LORD MACNAGHTEN observed, at p. 393, that the question was whether

> the voyage was not a voyage of the character contemplated by the agreement according to its fair meaning.

I think, therefore, that the recorder directed his mind to the correct point, and that the answer which he gave to the question which he put to himself was one which, in my opinion, was amply justified by the evidence in the case. It appears to me that the only real distinction between the case of the *Palace Shipping Co.* (1) and the present case lies in the fact that in that case it was one of the facts that the cargo being loaded was contraband of war. However, that fact became material only because the carriage of contraband made it likely that there would be interference with the ship by one of the belligerents, with possible danger of imprisonment to the crew. On the facts of this case, I think that there clearly was ample justification for the view held—I think it may now be said admittedly reasonably held—by the men, that the voyage which they were asked to undertake with a cargo of nitrate for Spain was a voyage which would be likely to be attended with danger to themselves. In my view, therefore, this case comes within the exact language used by LORD MACNAGHTEN in the judgment to which I have referred, when he said, at p. 393:

> A voyage to Sasebo [in this case to Seville in Spain], a naval base belonging to one of the two belligerents, would necessarily involve risks to life and property different from and in excess of those incident to the employment of seamen engaged in peaceful commerce.

Appeal dismissed with costs.

Solicitors: *Botterell & Roche* (for the present appellant); *Silverman, Jordan & Co.*, agents for *Silverman & Livermore*, Liverpool (for the present respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

PRENDERGAST (INSPECTOR OF TAXES) *v.* CAMERON.

[KING'S BENCH DIVISION (Lawrence, J.), **April 5, 6, 1938.**]

Income Tax—Company director—Payment for retaining office—Whether payment in discharge of a contingent liability on the company—Income Tax Act, 1918 (*c.* 40), *Sched. E.*

The respondent, who for many years had been a director of a company, towards the end of 1934 notified his fellow-directors of his intention to resign, as he was entitled to do under the articles. The other directors thereupon wrote asking him not to serve notice of resignation, and saying that, in consideration of his not doing so, the company would pay him a sum of £45,000, and would enter into a formal deed to that effect. The company shortly afterwards entered into a deed, which recited that the company, in the circumstances set out in the letter, and for the consideration therein specified, agreed to pay the respondent £45,000, in two amounts of £35,000 and £10,000 respectively. The remuneration of directors was at all material times by resolution of the company in general meeting. The respondent, who, previous to the execution of the deed, had received a salary of £1,500 a year, agreed to remain a director at £400 a year, on the understanding that he would devote less time in the future to the company's business. The respondent contended that the possibility of his resigning was a contingent liability on the company, that this liability had in the meantime been discharged by payment of the said sum of £45,000, and that the case was therefore analogous to *Dewhurst's* case (1) and the said sum was not liable to income tax :—

HELD : (i) the payment was not made in discharge of a contingent liability, as the company owed the respondent nothing, and the case was not, therefore, analogous to *Dewhurst's* case (1).

(ii) the payment, being made in consideration of the respondent remaining a director of the company, and he never having ceased to be such, constituted a profit arising from his office as director.

[EDITORIAL NOTE. A voluntary payment to the holder of an office or employment is a profit of the office or employment if it accrues to the holder in virtue of such office or employment, notwithstanding that there may be no legal obligation to make the payment. The circumstances in which the payment is made must all be taken into account in deciding whether the payment is a profit of the employment. The present case would seem to suggest that the fact that the payment is a very large one, and disproportionate to the usual emoluments—in short, that in appearance the payment is of a capital, rather than of an income, nature—would not seem to be a very material consideration. Other considerations apply where the payment is made after the cessation of the office or employment.

AS TO VOLUNTARY PAYMENTS TO DIRECTORS AND SERVANTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 213, 214, para. 435 ; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Case referred to :

(1) *Henry* v. *Foster* (*A.*), *Henry* v. *Foster* (*J.*), *Hunter* v. *Dewhurst* (1932), 16 Tax Cas. 605 ; Digest Supp. ; *sub nom. Dewhurst* v. *Hunter*, 146 L.T. 510.

APPEAL by way of case stated under the Income Tax Act, 1918, s. 149, by the commissioners for the special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts and arguments are set out in the judgment.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

Raymond Needham, K.C., and *R. A. Willes* for the respondent.

LAWRENCE, J. : I am obliged to counsel in this case for their able and ingenious arguments. The question is whether the sum of £45,000, which was paid to the respondent, in pursuance of a letter of Dec. 17, 1934, on Dec. 31, 1934, is taxable income under Sched. E.

The respondent had been for many years a director of a company of builders and contractors. Towards the end of 1934, he had intimated to his fellow-directors his intention of resigning, as he was entitled to do under art. 107 of the company's articles of association. The other directors then wrote to him a letter of Dec. 17, 1934, in which, after having considered his recent intimation that he intended forthwith to determine his directorship, they asked him, in the interests of the company, not to serve such notice, and said that, in consideration of his acceding to this request, the company would, within a certain time, pay him a sum of £45,000, and would embody their undertaking so to do in a formal deed. Then, on Dec. 31, 1934, the company entered into the deed which recited that the company, in the circumstances set out in the letter of Dec. 17, 1934, had, for the consideration therein specified, agreed to make the respondent the payments thereinafter set out—that is to say, £35,000 and £10,000.

The commissioners have held that the respondent received the sum of £45,000 for the consideration expressed in the letter of Dec. 17, 1934, and embodied in the deed of Dec. 31, 1934. They state that they accept the deed as genuine, and find that the conditions contained therein had been carried out.

The remuneration of the directors was made at all material times by resolution of the company. The facts as to remuneration, which are rather obscure, are set out in paras. 6 to 9 of the special case, but I do not think it is necessary for me to detail them now. The commissioners also find as a fact that the respondent agreed to stay on as a director at a salary of £400 per annum, on the understanding that he would devote less time in future to the company's business. The respondent up to Dec., 1934, had been receiving a salary of £1,500 per annum.

The commissioners in these circumstances decided that the £45,000 in the hands of the respondent was not subject to income tax under the provisions of Sched. E.

It is argued on behalf of the Crown that the sum of £45,000 constitutes salary, fees, wages, perquisites, or profits from his office as a director, and that the case is distinguishable from *Dewhurst's* case (1).

The respondent, on the other hand, contends that the case is covered by the case of *Dewhurst* (1), and that the findings of the commissioners in this case amount to the facts that the consideration for the payment of £45,000 was a momentary or instantaneous promise on the part of the respondent not to serve a notice of resignation, and that the £45,000 was not paid in any sense for his past services, or for any future services, and that the possibility of his resigning, under art. 107 of the articles of association, was a contingent liability upon the company, and that, that contingent liability having been discharged for the moment of time, the case is strictly analogous to the case of *Dewhurst* (1), and that the findings of the commissioners, that the consideration expressed by the letter and deed was the true consideration, make it impossible to hold that the consideration for that payment was in any shape or form the performance of future services.

On the other hand, it is contended for the Crown that the facts of the *Dewhurst* case (1) are quite different from the facts of this case. There the director, Commander Dewhurst, was entitled, under his original contract of employment or office, to receive a large sum of money on resigning. The payment of £10,000 which was made to him was made in discharge of a liability of the company under his original contract. In the present case, it is contended that it is impossible to consider the discharge of the suggested contingent liability of the resignation of the respondent as in any way comparable with, or analogous to, the discharge of the contingent liability of the company in *Dewhurst's* case (1) from the payment of a large sum of money.

In my opinion, it is true that the observations of Lord Atkin in *Dewhurst's* case (1) can be used to support the contention put forward on behalf of the respondent, as also can the reasoning of Lord Thankerton—notably the opinion of Lord Atkin, at p. 645, and the opinion of Lord Thankerton, at p. 649. Lord Warrington, however, who was the other member of the House who formed the majority, decided the case upon its own special facts, which he considered very peculiar. In these circumstances, having regard to that difference of opinion in the House of Lords, and to the difference in the facts here, it seems to me that I am not bound by that decision to accept the arguments of the respondent in this case. The respondent never having ceased to be a director of the company, in my opinion the sums which he received from the company are *prima facie* profits from his office as a director, within the meaning of Sched. E, r. 1. The fact that he acceded to the request made in the letter of Dec. 17, 1934, involved that he would remain as director of the company for some period, and that undertaking to remain as director of the company for some period was the consideration for the payment of £45,000. I cannot regard it as a discharge of a contingent liability in the sense spoken of by the noble Lords in the *Dewhurst* case (1). The respondent acceded to the request not to give notice under art. 107 of the articles of association. In *Dewhurst's* case (1), the company was liable to the director for a sum exceeding £10,000. Here the company was not liable to the director for anything, upon the facts found by the commissioners. Therefore, I think that the true consideration for the payment of the £45,000 must have been the desire of the company that he should continue as a director. If that were the consideration for the payment, then the payment arises from his office as director. For those reasons, in my judgment, the decision of the House of Lords in the case of *Dewhurst* (1) does not govern this case. I am of opinion that the commissioners, though they did not refer to *Dewhurst's* case (1), must have had that case in mind. If not, then they have come to an erroneous conclusion in law. In my opinion, the appeal, therefore, must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Edell & Co.* (for the respondent).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

HUNTER *v.* WRIGHT.

[COURT OF APPEAL (Slesser and Clauson, L.JJ., and Goddard, J.), **April 8, 11, 1938.**]

Negligence—Vehicle on highway—Skid—Vehicle mounting pavement—No negligence on part of driver.

The defendant was driving a motor car when it skidded, and subsequently mounted the pavement and injured the plaintiff, who was walking thereon. It was found that the skid was not due to any negligence on the part of the defendant, but it was contended that she had been negligent (i) in steering the wrong way to correct the skid, and (ii) in accelerating after the skid. Shortly before the accident, she had practically stopped at a pedestrian crossing, and was accelerating when the skid occurred. The speed of the car was estimated at 16 to 20 miles per hour, and the car travelled 13 ft. to 20 ft. between the skid and the pavement :—

HELD : the time and space at the disposal of the defendant in which to remedy the skid were so short that, it being proved that the skid was not due to any fault of hers, she had discharged the onus of showing how her car came to be on the pavement, and could not be said to have been in any way to blame for the accident.

[EDITORIAL NOTE. It was decided many years ago that a skidding vehicle is not in law a nuisance, nor is the skidding in itself any evidence of negligence on the part of the driver. There are also cases which have decided that the mounting of a car upon the pavement is *prima facie* evidence of negligence upon the part of the driver. Here the combination of these matters is considered, and the result is that, when a car mounts the pavement by reason of a skid, not due to negligence on the part of the driver, there is no fault for which the driver is responsible, and no action lies in respect of such a skid.

AS TO PRESUMPTION OF NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 671-675, paras. 956-958 ; and FOR CASES, see DIGEST, Vol. 36, pp. 88-92, Nos. 589-607.]

Cases referred to :

(1) *Hammack* v. *White* (1862), 11 C.B.N.S. 588 ; 36 Digest 89, *590* ; 31 L.J.C.P. 129 ; 5 L.T. 676.

(2) *Ellor* v. *Selfridge & Co., Ltd.* (1930), 46 T.L.R. 236 ; Digest Supp.

(3) *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596 ; 36 Digest 91, *601* ; 34 L.J. Ex. 220 ; 13 L.T. 148.

(4) *Halliwell* v. *Venables* (1930), 99 L.J.K.B. 353 ; Digest Supp. ; 143 L.T. 215.

APPEAL by the plaintiff from a judgment of LEWIS, J., dated Nov. 18, 1937. The facts are fully stated in the judgment of SLESSER, L.J.

Sir Walter Monckton, K.C., and *N. R. Fox-Andrews* for the appellant.

Tristram Beresford, K.C., and *C. J. A. Doughty* for the respondents.

SLESSER, L.J. : This has proved a difficult case, and we are very indebted to counsel on each side for the careful considerations which have been urged before us. On Feb. 28, 1937, the plaintiff, who was walking on the footway in High Street, Rochester, had reached a point on the pavement opposite a shop, No. 200, High Street, and was apparently standing there waiting for an omnibus. A woman driving a motor car had come up into a triangular area, formed by the joining of High Street, Corporation Street and Star Hill, Rochester, and was approaching an island which is in the middle of that triangle. By that island, on the eastern side, is a police-stand, and on that police-stand there was standing a policeman, directing the traffic. Shortly before that, the woman driver had found it necessary to pass a pedestrian crossing, and had practically or entirely come to rest. After she passed the police-stand, she proceeded, and had reached a point just beyond the police-stand A in the direction of Star Hill when the car unfortunately got into a skid. The judge says:

> I am of opinion that that skid was not caused by any negligence on the part of the driver of the car.

B The result of the skid was that the car, after swerving, as the judge found, to the right, ultimately shot across, ran on to the pavement, and seriously injured the plaintiff, and another person who was standing there. The plaintiff brings this action for damages, alleging the negligence of the driver and a Mr. Wright, the owner of the car, who was with the driver in the car. C

The law of this matter is really not in dispute. As was pointed out many years ago by Willes, J., in *Hammack* v. *White* (1), at p. 596, the position is this:

> The circumstance which very much weighed with me was, that here was a man riding on the foot-pavement, and therefore *prima facie* in the wrong. D

The principle which was applied there—that, where a rider is on a pavement, he has to explain his situation in a place where *prima facie* he is not entitled to be—has been applied to the case of a motor car. Particularly one may mention the case of *Ellor* v. *Selfridge & Co., Ltd.* (2), E a judgment of Scrutton and Romer, L.JJ., sitting as a Divisional Court. That was a case where, according to the headnote, the plaintiff was standing with her husband on the pavement of the Broadway at Southall with her back to the traffic, when

> . . . the motor van came behind them, mounted the pavement . . . and knocked F them both down. No evidence was called at the trial on behalf of the defendants. They contended that the onus of proof of negligence was on the plaintiffs.

Scrutton, L.J., in giving judgment, at p.236, quoted first the judgment of Willes, J., to which I have already referred, and also a passage in the judgment of Erle, C.J., in *Scott* v. *London Dock Co.* (3), where he said, G at p. 601:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. H

Scrutton, L.J., after citing those authorities which I have mentioned, is reported thus, at p. 236:

> In his opinion, the fact that in the present case the motor van appeared on the pavement, where it had no business to be, and injured the plaintiffs on the pavement, and the further fact that the defendants offered no explanation why their

van was there, seemed to be more consistent with negligence than with the exercise of reasonable care.

ROMER, L.J., is reported, at p. 236 :

> But a motor van had no right to make use of that particular part of the highway. The defendants here had called no evidence, and it was essential for them to show A how their motor van got on to the pavement.

That judgment, which was a judgment of the Divisional Court, was approved by the Court of Appeal in *Halliwell* v. *Venables* (4), where SCRUTTON, L.J., said, at p. 355 :

> . . . in the case of *Ellor* v. *Selfridge & Co., Ltd.* (2), quite recently we held that as B motor cars do not usually run on to the pavement and hit people in the back, the fact that a motor car did run on to the pavement and the man who was driving it gave no explanation with regard to why it ran on to the pavement, was in itself evidence of negligence in the absence of explanation, to entitle the plaintiff to have the case left to the jury.

LAWRENCE, L.J., and I concurred with that opinion.

C In the present case, as I have said, the judge has come to the conclusion that the skid was not caused by any act of negligence on the part of the driver of the car. So far as that part of his finding is concerned, I can see nothing about which complaint can be made. The evidence, in particular that of Mrs. Grasty herself, goes to support that view.

D Therefore, the case is in this position. At the time when the skid happened, it was, as one may say, an act of God, and the defendant committed no negligence in producing that state of affairs. Then it is said, however, that, notwithstanding that fact, the defendant has been negligent, and therefore cannot use the skid as a complete explanation of the E ultimate presence of the car on the pavement, for two reasons. Of those two reasons, the first has been dealt with in some detail by the judge, but, as I read his judgment, he has not given any concluded consideration to the second.

The first of the reasons why it is said that the defendant, Mrs. Grasty, F was negligent is that, having got into this skid, the car afterwards found itself upon the pavement, and injured the plaintiff, not merely as a result of the skid, but owing to the fact that the car was in a state of acceleration, either because the car was being accelerated at the time when the skid took place, or because the lady pressed the accelerator and G increased the speed and forced the wheels to revolve again after the skid, or because she failed, the car having been originally in this state of acceleration, to prevent the results of its skidding by performing some other manœuvre.

The space where this accident occurred is a very confined space. It H is not necessary here to mention the actual dimensions, but the fact remains that, on any view, after this skid had taken place, and the position of the car is taken into account, to avoid the pavement there was not in time more than half a second in which to do anything. That is on the view that the car was travelling at 16 miles an hour. It was said by some witnesses that the car was travelling at 20 miles an hour, in which case there was a period of only two-fifths of a second in which anything could be done. It might have been that evidence might have been produced to show that this lady had pressed the accelerator at the moment of the skid, and so caused the car to go on the pavement, where the skid would not have taken it, but, in my view, no such evidence appears in the present case. [The Lord Justice considered the evidence.] A

I think that there is no necessity here to order a new trial, in that we have all the necessary material before us. The fact that the judge has misconceived some of the evidence, as I think he has, does not prevent us from coming to the same conclusion, and from applying the rule which may be applied, as has been said by the House of Lords, not only B to the case of juries, but also to other cases, under which we should not order a new trial unless there would be some miscarriage of justice. I think that, in all the circumstances in this case, it would be wrong to order a new trial, and that the misconceptions of the judge do not, on the evidence, affect the result which would have been arrived at in the C defendants' favour. This appeal, therefore, must be dismissed.

Clauson, L.J.: I agree that this appeal must be dismissed. The fact that the car ran on to the pavement would, in the absence of any explanation by the defendants, be evidence of negligence in the driving D of the car. An explanation, however, is forthcoming, and that explanation is that the car ran on to the pavement because of a skid, which was not caused by any negligence of the driver. The judge has found that the skid was not caused by any negligence of the driver, and there seems to be no ground for upsetting that finding. Nevertheless, although the E skid was not caused by the negligence of the driver, it would, of course, be conceivable that some act or default of the driver might have had the effect of causing the results of the skid to be worse than they would have been but for that act. The judge has found that the effect of the skid was that the car got out of control, and remained out of control until it F had hit the plaintiff while he was standing upon the pavement.

It was suggested that there were two factors, due to the action or inaction of the driver, which occasioned the mounting of the pavement. The first was that the lady turned her wheel the wrong way when the skid had occurred, and that, had she not done that, the accident would G not, or might not, have occurred. Little importance, however, appears to have been attached to this point in the court below, and I am quite satisfied that the judge took the view that that turning of the wheel, if indeed it took place, had no material effect upon what occurred. I see no material which enables me to differ from that view. H

It was also suggested that, owing to something which the lady did with the accelerator pedal, consequences ensued—namely, the mounting of the pavement—which would not have ensued had that not taken place. In that regard, the judge seems to have made a slip as to the weight he attached to the evidence of a particular witness. Nevertheless, it appears to me, on the evidence we have, that it is quite impossible to hold that anything that occurred in regard to the accelerator had any effect on what happened, or that anything which could have been done at that moment by the lady would have prevented the accident. That is the view the judge took. Accordingly, in my view, there is no ground upon which this decision can be reversed. In my view, he came to a right decision, except for a slight inaccuracy in reference to one witness. For these reasons, I agree that the appeal must be dismissed.

GODDARD, J.: I agree. I also agree with Sir Walter Monckton that this is a case of importance, in some respects, from the public point of view. Sir Walter emphasises the fact that the occasion on which this lamentable accident happened was at a time when the road was free of traffic. A gentleman on his lawful occasions, on Sunday morning, on the footpath is struck from behind, run down, and grievously injured. However, according to the view of the judge, and in the view of this court, he cannot recover damages. The late SWIFT, J., who, at the time of his lamented death, had an unrivalled experience of these cases, said, on more than one occasion, using the vigorous language which characterised him, that, if Parliament allowed such potentially dangerous things as motor cars to run on the public streets, it ought also to provide that people who were injured by them through no fault of their own should receive compensation, though not necessarily compensation from the driver if the driver has been guilty of no negligence. It is a shocking thing, no doubt, that Colonel Hunter should have been injured in that way; but it would be an equally shocking thing if, when the lady, Mrs. Grasty, who was driving this car, was guilty of no negligence at all, she should be put under the imputation of having caused this grievous injury to a fellow-citizen, when in fact she has done nothing blameworthy at all.

When the facts of this case are properly appreciated, and when the dimensions of this plan and the situation of this accident are got clearly into one's mind, I think that it is perfectly clear that Mrs. Grasty did discharge the onus, which lay upon her, of showing that she was guilty of no negligence. Once it has been decided—and this point is not challenged by Sir Walter Monckton—that the car in which the lady was driving got into a skid through no fault of her own, it seems to me that it is absolutely impossible to say that she had either the time or the space in which to correct the consequences of that skid. At the worst for her, it is a second; at the best for her, it is about two-fifths of a second. When one says that, if she had turned the car one way, she might have done something, or, if she had turned the car another way, some other consequence might have happened, I think that one is reduced to an element of speculation. It is like the question which is so constantly asked in running-down cases, and which is of very little use in deciding them: "How quickly can you pull up your car if necessary?" If the true answer is given, it is that no one knows how quickly one can pull up a car when going at any given speed. One may know how quickly one can do it in going through a test. If one is going past a particular point, and knows that at that point one is going to put on the brakes and see how quickly they will act, no doubt one can do it and get the record. In this case, however, the human mind has to grasp the fact that something has gone wrong, and has to decide how to act. When one has got less than a second, and not more than 15 ft., or possibly 20 ft., before the accident happens, it seems to me impossible to say that, once the lady has shown that she skidded without any fault, any fault remains in her, or that any possibility of fault remains in her. The judge perhaps came to his decision on a ground on which other people might not do so, but at any rate he did come to a clear decision that the lady had satisfied him that she mounted the pavement through no fault of her own. Once it is conceded that the alleged skid was through no fault of the lady, I can see no other conclusion to which any court could come. I therefore agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Hunters* (for the appellant); *P. A. Gascoin* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

JONES *v.* VERNON'S POOLS, LTD.

[Liverpool Spring Assizes (Atkinson, J.), **April 11, 12, 1938.**]

Contract—Express exclusion of legal liability—Football pool—Action in respect of successful coupon.

The plaintiff alleged that he had duly filled in a coupon in respect of a pool on football matches organised by the defendants, and the defendants alleged that they had never received that particular coupon. The conditions of the pool, which the plaintiff admitted were well known to him, stated that it was a basic condition of the relationship between the parties that the sending in of the coupon or any transaction entered into in respect of the pool should not be attended by or give rise to any legal relationship, rights, duties or consequences whatsoever, or be legally enforceable or the subject of litigation, but that all such arrangements, agreements and transactions should be binding in honour only:—

Held: the conditions of the pool prevented the plaintiff from bringing any action to enforce payment or otherwise.

[EDITORIAL NOTE. It is settled law that there can be transactions between parties which are intended to be only gentlemen's agreements, and not to be enforceable in courts of law. Conditions attached to the pool in the present case obviously intended to oust the jurisdiction of the courts in the matter, and they are held to be effective for this purpose.

As to Express Exclusion of Legal Liability, see HALSBURY, Hailsham Edn., Vol. 7, pp. 65, 66, para. 83; and for Cases, see DIGEST, Vol. 12, pp. 20-22, Nos. 1-7.]

Case referred to:

(1) *Rose & Frank Co.* v. *Crompton (J. R.) & Brothers, Ltd.*, [1925] A.C. 445; Digest Supp.; 94 L.J.K.B. 120; 132 L.T. 641.

Action claiming certain moneys from the defendants in respect of a football-pools transaction. The facts are fully set out in the judgment.

N. B. Goldie, K.C., and *G. G. Blackledge* for the plaintiff.

G. J. Lynskey, K.C., *Howard-Jones* and *Gerson Newman* for the defendants.

A

Atkinson, J.: The defendant company exists for the purpose of running pools on football matches, and anybody who wants to share in one of these pools must apply for and obtain from the defendants a coupon. He then has to fill in his selections, and post the coupon to the
B company in time for them, I gather, to receive it on the Saturday morning before the games are played. The coupons provide room for a number of pools, and with regard to each pool there is room for a considerable number of selections. A person filling in a coupon can fill in as many of these selections as he likes. There is a fee payable in respect
C of each selection, and, when he sends in his coupon, one thing he must not do is to send any money with the coupon. The money which is due in respect of that coupon should be sent in on some subsequent date. In practice, it is generally sent in, I gather, with the coupon sent at the end of the week following.

D The plaintiff's case is that on Oct. 1 he sent to the defendants two coupons of his own and one of his wife's, entering for pools which were to apply to the matches to be played on Oct. 2. One coupon sent in, which we have called P1, contained a considerable number of selections, and one feature of that coupon at any rate is that the penny points pool
E was filled in *in extenso*. In other words, every column had got a number—either a 1, which indicated that the selection for a win was the home team, or a 2, the team playing away, or an X, which indicated a draw. Every space was filled in with a 1 or a 2 or an X. Apparently the same result would have been achieved in a very much shorter way,
F because, in making these selections, the practice is apparently to select a number of certainties, or a number of matches in respect of which the selection is the same in every one of the selections. As to the remainder, they vary in all sorts of ways, making up what has been described as a permutation. That, as between two people who understand what it all
G means, can be indicated very shortly, but at any rate one of the points about that form is that it is filled up *in extenso*.

In the centre of the coupon there is a little column for figures, and one has to fill in the amount owing in respect of each pool. For instance, there were nine pools, I think, on that coupon, and the number of
H selections which the plaintiff had made and filled up indicated that he owed 12*s*. in respect of that coupon, which it would be his duty to send in the week after. The plaintiff says that he also prepared and sent in a coupon which we call P2. The original is not produced, but he produces a copy. The feature of that copy is that it refers to the same penny points pool in respect of which there may be a number of selections on

P1, and on this coupon there were 81 different selections. Here, however, it is filled in in the short way, occupying a very small part of the form, and in respect of those selections a sum of 6*s.* 9*d.* was owing. Just above the figures in P1, there is a little space in which the person sending in the coupons is told this:

> If more than one coupon or sheet is submitted the number for Oct. 2, 1937, must be entered here.

In that space on P1 he filled in the figure 2, because, as he says, he was sending two coupons, and in the list of amounts he added the 6*s.* 9*d.* which was owing, or would become owing, in respect of P2, making up altogether a sum of 18*s.* 9*d.* He in fact owed in respect of previous coupons the sum of 19*s.* 9*d.*, but for some reason or other he sent with this coupon the sum of £1 0*s.* 9*d.*—a postal order for £1, a postal order for 6*d.*, and 3*d.* in stamps. The same day, the Thursday, his wife had filled in P3, making her selections, in respect of which the sum of 7*s.* 9*d.* was owing. They swear that the three coupons were pinned together, and that the two postal orders were pinned to them, with the 3*d.* in stamps attached to one of the postal orders, and that these documents were put in one envelope.

As it turned out, the selections on P2 would have met with extraordinary success. In respect of one column, he would have been entitled to £1,785 2*s.* 3*d.*, in respect of two other columns or lines to £249 13*s.* 4*d.*, in respect of two other lines £44 11*s.*, in respect of eight lines to £43, and another eight lines £2 8*s.*, amounting in all to £2,137 14*s.* 7*d.* Indeed, it would have been an amazingly successful coupon. To his surprise, he heard nothing from the defendants. He wired about it and wrote about it and had interviews about it, but the defendants told him that they could find no trace of P2. They received coupon P1, and they received his postal order, but they said that they had never received the other coupon, and that therefore, to their regret, he could not get division of the funds available.

Being quite certain he had posted this coupon, he brings this action, which, of course, at once raises two questions: (i) the question of fact of whether or not he sent it, and (ii) whether or not, if he did send it, he is entitled to maintain this action.

I am not going to decide the question of whether or not he posted it. I do not think that there is any need to do so. I would have to hear a good deal of evidence from the defendants, and there is no use wasting time deciding that question of fact when, even if I decided that the document was received by the defendants, I would still be satisfied that the plaintiff had no claim. It is only fair to the defendants to make it perfectly clear that it does not make the slightest difference to them whether or not they received the plaintiff's coupon. They take a certain percentage of all the money received, and the rest is divided up. They do not mind a bit how it is divided, or whether there are eight people or nine people entitled to it. It only means that there is so much less for others. They have no interest in it one way or the other. Of course, they are most anxious that the thing shall be carefully and properly conducted, and that everybody who has got a moral claim to share in the money shall be admitted to claim. They have a system which they believe is perfect, or as near perfection as human arrangements can A make it, and, if there is any mistake, no one is more sorry about it than they are. In this case, however, no one is satisfied that they have made a mistake, and through their counsel they have emphasised that.

When all is said and done, this coupon is sent in on certain terms which are printed on the back of every coupon, and the plaintiff admits B that he knew perfectly well what these rules were, and that he read them, and if anybody can understand them he can. He makes no suggestion that there is anything in those rules which misled him in any way, or that he could not understand them, or that there was anything ambiguous about them, or that he thought they meant anything different C from what in fact they do. It seems to me that the purpose of these rules is this. The defendants wish it to be made quite clear that they are conducting these pools on certain clear lines, and they intend to say by these conditions: "Everybody who comes into these pools must understand that there are no legal obligations either way in connection D with these pools. We are going to do our best. Every care will be taken, and we employ accountants, but this money must be sent in on the clearest understanding that this is a gentlemen's agreement, an agreement which carries with it no legal obligations on either side, and confers no legal rights."

E That there can be agreements of that kind, recognised by law, is perfectly clear from the case of *Rose & Frank Co.* v. *J. R. Crompton & Brothers, Ltd.* (1), where quite a complicated arrangement was made between an American firm and certain English companies relating to the method of doing business together, which was expressed to be a F gentlemen's agreement, and to confer no legal rights. Disputes arose on that agreement, but it was held that those words governed the whole agreement. There is nothing unlawful or against the law in having a gentlemen's agreement, and the law would recognise to the full an agreement of that kind.

G This purports to be an agreement of that kind, an agreement which is merely to confer rights short of legal rights, rights which cannot be enforced at law. The very first condition is this:

> This coupon is an entry form containing the conditions on which it may be completed and submitted to us and on which alone we are prepared to receive and, if we think fit, to accept it as an entry.

H

In other words, it is making quite clear that these conditions which follow govern the whole relationship between the defendants and anybody sending in coupons. Secondly:

> It is a basic condition of the sending in and the acceptance of this coupon that it is intended and agreed that the conduct of the pools and everything done in

> connection therewith and all arrangements relating thereto (whether mentioned in these rules or to be implied) and this coupon and any agreement or transaction entered into or payment made by or under it shall not be attended by or give rise to any legal relationship, rights, duties or consequences whatsoever or be legally enforceable or the subject of litigation, but all such arrangements, agreements and transactions are binding in honour only.

That is a clause which seems to me to express in the fullest and clearest way that everything that follows in these rules is subject to that basic or overriding condition that everything that is promised, every statement made with relation to what a person sending the coupon may expect, or may be entitled to, is governed by that clause.

If it means what I think that they intend it to mean, and what certainly everybody who sent a coupon and who took the trouble to read it would understand, it means that they all trusted to the defendants' honour, and to the care they took, and that they fully understood that there should be no claim possible in respect of the transactions.

One can see at once the impossibility of any other basis. I am told that there are a million coupons received every week-end. Just imagine what it would mean if half the people in the country could come forward and suddenly claim that they had posted and sent in a coupon which they never had, bring actions against the pool alleging that, and calling evidence to prove that they had sent in a coupon containing the list of winning teams, and if Vernons had to fight case after case to decide whether or not those coupons had been sent in and received. The business could not be carried on for a day on terms of that kind. It could only be carried on on the basis that everybody is trusting them, and taking the risk themselves of things going wrong. It seems to me that, even if the plaintiff established that this coupon was received, it was received on the basis of these rules, and that he has agreed in the clearest way that, if anything does go wrong, he is to have no legal claim. In other words, he has agreed that the money which *prima facie* became due to him if that coupon reached them is not to be the subject of an action at law. There is to be no legal liability to pay. He has got to trust to them, and, if something goes wrong, as I say, it is his funeral, and not theirs. I am convinced that that is the position here, and, even if the coupon were received, he has failed to establish that he would have a claim which he could come to the courts to enforce. Therefore I give judgment for the defendants.

Judgment for the defendants with costs.

Solicitors: *John A. Behn, Twyford & Reece* (for the plaintiff); *North, Kirk & Co.* (for the defendants).

[*Reported by* M. D. Chorlton, *Barrister-at-Law.*]

DANIEL *v.* RICKETT COCKERELL & CO., LTD., AND RAYMOND.

[KING'S BENCH DIVISION (Hilbery, J.), **April 27, 1938.**]

Negligence—Pavement—Opening to coal-cellar left unguarded during delivery of coal to premises—Pedestrian stepping into hole—Liability of coal merchant and occupier of premises—Law Reform (Married Women and Tortfeasors) Act, 1935 (*c.* 30), *s.* 6 (2).

The plaintiff, while walking along a pavement on a windy and rainy day, and with her umbrella up, suddenly put her foot through a hole in the pavement caused by the removal of a cellar-flap which gave access to a coal-cellar, fell and was injured. The cellar-flap had been removed, at the direction of a representative of the occupier of the premises, by a coal-man employed by the coal merchants delivering coal there. The coal-man had no assistance, so was himself obliged to do all that was necessary to deliver the coal to the premises. He opened the cellar-flap, then returned to his cart about 6 ft. distant to prepare to unload it, and so for a short time left the hole unguarded. He saw the plaintiff coming, but turned his back on her to proceed with the unloading of the cart, and not until he actually saw her falling did he give any warning. The plaintiff sued both the coal merchants and the occupier, and these parties claimed a contribution or indemnity against each other in respect of any judgment:—

HELD: (i) the plaintiff using the footpath in a normal way was entitled to expect it to be in an ordinary condition of safety, and she was under no duty, merely because the pavement contained cellar-flaps, to keep a special look-out lest any of them should have been taken up and a cellar-hole left open, and was not guilty of any contributory negligence.

(ii) the cause of the accident was the failure of the coal-man to exercise adequate care for the protection of foot passengers expected to use the footpath lawfully, and the coal merchants were accordingly liable to the plaintiff in damages.

(iii) the occupier was also liable, as he had directed the coal-man to remove the cellar-flap, and that removal had created a danger in the highway.

(iv) in proceedings for contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2), the court had to exercise a judicial discretion and to assess the amount of contribution recoverable on the basis of a fair division of responsibility between the parties, and the coal merchants were liable for nine-tenths and the occupier for one-tenth of the amount of damages awarded to the plaintiff.

(v) the declaration as to contribution covered the costs of the action, and, in the circumstances of this case, the occupier should have nine-tenths of the costs of the proceedings between him and the coal merchants.

[**EDITORIAL NOTE.** The question in this case is whether or not the occupier of the premises is entitled to a complete indemnity against liability to the injured plaintiff from the coal merchants. The only act on the part of the occupier was a permission or authorisation to remove the plate covering the coal-hole, and it was contended that, if this removal had been accompanied by a proper diligence on the part of the carman, no accident could have happened. It is held, however, that the occupier is not entitled to a full indemnity, but to a contribution only. It will be noted that the costs both of the action and of the proceedings between the two defendants are here to be borne in the same proportion as the damages.

AS TO CONTRIBUTION BETWEEN TORTFEASORS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 687, 688, para. 970; and FOR CASE, see DIGEST, Supp., Tort, No. 108 a.]

Case referred to:

(1) *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 36 Digest 51, *312*; 4 L.T. 470.

Action for damages for personal injuries received by the plaintiff, who, while walking along the pavement, fell down a coal-hole which had been left open and unguarded by the servant of the defendants Rickett Cockerell & Co., Ltd., coal merchants, while delivering coal to the premises of the defendant W. R. Raymond.

The plaintiff left her house in Ashburn Gardens at about 12.50 p.m. on Apr. 20, 1937. She turned to the right on leaving her gate to go along the pavement, and, as the day was both wet and very windy, she put up her umbrella. It was found as a fact that the plaintiff was hard of hearing. The next thing the plaintiff realised was that her right foot and leg had gone down a hole, and she was thrown down. The hole was an open cellar-flap, without any guard. Two witnesses who saw the accident agreed as to this, and one of them, though he was quite close to the scene of the accident, heard no warning. It appeared that the coal-man in the employ of the coal merchants went to the house with a ticket, and was told by the occupier's representative to open the cellar-flap and put the coals in. The coal-man, who had no mate with him, and who had therefore to perform singlehanded all the delivery operations, lifted the cellar-flap, thus making an open hole in the pavement, and turned to unfasten the chain at the back of the cart and to begin to unload the sacks of coal from the cart. As the cellar-flap was about 6 ft. from the kerb (and therefore from the cart), after the coal-man had opened the cellar-flap and busied himself about the back of the cart, he had for a short time left an unguarded hole in the pavement. He realised this was a danger, because he admitted that he had heard of people falling down such cellar-flaps, but he left the unguarded danger there. He saw the plaintiff coming, and turned his back to unhook the chain. Until she had fallen, he did not turn back or call out, but, as he turned back, her falling, or the sight of her falling, caused him to utter some warning when it was too late. He held up the sacks of coal on the cart with one hand, and did his best with the other hand to prevent the plaintiff from falling down the hole, but his efforts were unsuccessful.

H. J. Wallington, K.C., and *F. Wishart* for the plaintiff.

F. S. Laskey for the first defendant.

Hon. Quintin Hogg for the second defendant.

Hilbery, J.: It is said on behalf of the defendants, the coal merchants, and on behalf of the occupier, that the plaintiff was herself guilty of a want of reasonable care for her own safety, and that the defendant coal merchants were not guilty of any want of care, in the circumstances. It appears to me that it is plain that the plaintiff—and this is a most important point—was on this day an ordinary foot passenger, using an ordinary footpath in London. She was, in other words, an ordinary user of that part of the highway which is provided more especially for the use of foot passengers, and upon which vehicular traffic is not supposed to go. She was entitled to expect to find the footpath in its ordinary state and condition unless she received warning that it had been put into some unusual condition which was a danger to a user of the footpath in the ordinary way. If a cellar-flap, as was the case here, was open to the footpath, so as to make a hole in the A footpath that put the footpath into a condition of danger to the ordinary user, then it became the duty of the person who had altered the footpath from one on which the plaintiff might pass and repass with ordinary safety into one on which a person could pass and repass only by taking sufficient care to avoid the hole to take precautions for the safety of B those using it, and to see that they would, so to speak, have fair and sufficient warning of the danger, so as to protect them against it.

In these circumstances, I have to determine, first of all, whether there was a want of that care which the defendant, the coal merchants, had in this case towards the plaintiff. In my view, there clearly was C a want of care, which was the cause of the plaintiff's accident. I am not in the least impressed with the argument that there is any particular difficulty in carrying one or more collapsible tripods around the coal-cart so that one could put them, if one so desired, one on either side of the coal-hole. It does not seem to me to present an insurmountable difficulty. D He could easily have done what one often observes coal-men doing on such occasions—namely, standing two sacks one against the other on either side of the hole, so as to make a barrier to protect the passers-by—and then he could have opened the coal-flap and made the hole in the pavement. He did not do any of these things, because, in my opinion, E after listening to him, what he intended to do after he had opened the flap and put some coal in was to put some sacks round about the hole. No doubt he would in time have put some sacks round about the hole, but unfortunately he created a danger first, and, before he could establish effective measures of precaution, this accident occurred. I think that F it is plain in this case, as it is plain in the cases which have been cited to me, that he was to blame for a want of care which he should have exercised for the protection of foot passengers expected to use that footpath lawfully, and that that want of care caused the accident.

Has it been established that the plaintiff was guilty, on her part, G of not taking reasonable care for her own safety, which is incumbent on every user of the footpath, whether the day be a dry day or a wet one ? Has she been guilty of that want of care which prevented her from seeing the cause of her accident, or, in other words, the defendant's want of care ? In my view, that has not been established. As far as H I can see, the plaintiff on that occasion was using the footpath in the way in which any reasonable foot passenger might have used it. It is said that it was a day of wind and rain. That at least called for the use of an umbrella, and to some extent the use of an umbrella necessarily obscures the full view of the person who carries it. Nevertheless, she had a sufficient look-out for ordinary purposes, and, although she did not notice the coal-cart drawn up against the kerb, I cannot attribute a want of reasonable care to her merely because of that. Then it is said that she did not hear the warning, and I think it is suggested that she should take extra care on wet days to hear warnings, but that argument can be applied equally to the defendant and to the giving of the warning. If it is a boisterous day, and the defendant relies on giving a warning for the purpose of safeguarding the foot passengers, he must make his warning so obvious and so loud that a foot passenger must hear it. The truth is, of course, that he did not do that, because the warning really was in the nature of an exclamation wrung from him, in my view, in the emergency of the accident. He gave to nobody a warning which was sufficiently plain, or which was conveyed in time, and he provided no other form of safeguard or warning as far as any user of the footpath was concerned. The plaintiff therefore was not guilty, in my opinion, of any want of care such as would prevent her from recovering. She was entitled to expect the footpath to be a footpath in an ordinary condition of safety for the passage of foot passengers to and fro. I do not agree that a foot passenger is under a duty, merely because the footpath has cellar-flaps in it, to keep a special look-out, lest one or more of the cellar-flaps has been taken up and the cellar-hole left open. The consequence is, in my view, that she obviously recovers against the coal merchant.

The second defendant cannot escape liability, in the circumstances, because *Pickard* v. *Smith* (1) says that this is not a mere case, especially in the circumstances of this case, of a collateral act of negligence on the part of an independent contractor. The coal merchant here was called upon to deliver the coal into that cellar by the second defendant, and was called upon to open the cellar-flap in order to make the delivery, and was directed to do so. In these circumstances, he was directed to do the very thing which created a danger in the highway, in that he was directed to open the cellar-flap. Accordingly, I think that it is clear that the second defendant is also responsible in law, and he, of course, is therefore liable to judgment so far as the plaintiff is concerned.

I think that the answer to the first part of the very interesting and able argument addressed to me by Mr. Quintin Hogg in respect of his claim on behalf of the occupier for a complete indemnity is to be found in the facts of this case. He bases that claim, as I understand it, on these grounds: first, that the act which the second defendant delegated to the first defendant, the coal merchant, was of itself a lawful act, and, secondly, that it became an unlawful act only because it was done negligently by the first defendant's carman, and, through his collaterally negligent acts in doing that which the first defendant delegated to be done, the mishap overtook the plaintiff. I think that the answer to that is to be found in the decision which I have given as between the plaintiff and the defendant, because I decided—and as far as I am concerned it concludes the matter—that the second defendant had in fact directed the coal merchant, the first defendant, to come and deliver the coal, to open the cellar-flap in the pavement, and, through the opening thus made in the pavement, to deliver that which the coal-man had to deliver at the premises. In those circumstances, I can use in connection with this case words which can be taken practically *verbatim* from the judgment given in *Pickard* v. *Smith* (1), at p. 480 :

> . . . the defendant employed the coal merchant to open the trap in order to put in the coals ; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal-merchant ; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief.

There was, therefore, in this case an act done by the second defendant, in that he, through the agency of the coal-man, caused the flap to be removed and an opening to be made in the highway, which was one of the causes of this lady's disaster.

It is true that the negligent acts of the first defendant's carman, once the flap was open, were also causes without which the disaster to the plaintiff would not have occurred, and that they were the acts of omission which finally led to the disaster to the plaintiff, because, although the opening of the cellar-flap created a danger in the highway, it was a danger any ill results of which could have been avoided by the exercise of reasonable care on the part of the coal merchants' man. That view of the case seems to me to take it out of the realm of pure vicarious responsibility, as far as the second defendant is concerned. He is not being made responsible in this case, nor has judgment been passed against him, merely because the coal-man failed to take reasonable precautions, once the flap was open, to safeguard the foot passengers lawfully using the pavement ; but he is responsible, just as he was in *Pickard* v. *Smith* (1), upon the basis that I have just mentioned. It is not, therefore, a case of mere vicarious responsibility, and I think that that is really the answer to the first part of Mr. Quintin Hogg's argument for indemnity.

In the second place, Mr. Quintin Hogg says that, under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2), it is provided that :

> In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage ; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

I am told that nobody has so far decided what is the right interpretation to put upon those words " just and equitable " appearing in that section. We are not unaccustomed—at least most of us engaged in the law are not unaccustomed—to finding the word " just " in a statute, or " just and convenient," which is an association of words which occurs in another very well-known statute which has received judicial interpretation, and which, as a result of that judicial interpretation, has had certain limits placed upon it. I must, therefore, do what I can to construe those words, having regard to the context in which I find them, and I cannot, for myself, believe that they are intended to be used here strictly as terms of argument. When I see that those words are coupled with "having regard to the extent of that person's responsibility," exercising a judicial discretion in the matter, I am tempted to do that which I think is right between the parties, having regard to what I think, on the true facts of the case, is the fair division of responsibility between them. As a lawyer, I confess, that I am not very happy in giving that interpretation to the statute, but I believe that that is the intention of the section. If so, what was the extent of the responsibility for this mishap on the part of each of these parties, the coal merchant and the householder? One of the businesses of a coal merchant in London is the delivery of coal to a house, and, although I have not seen the contract for it, I think that I should not be straining my powers if I assume that the coal had been ordered by the householder in the ordinary way, which included delivery. The man arrives with the coal, and the man in charge of this load is sent alone by the coal merchant, probably as a matter of business economy. He comes to this house in London to deliver the coal in a way in which, of course, one has been accustomed to see coal delivered in London ever since one can remember. The coal-man, on presenting his ticket, has the coal-flap to the cellar of that house pointed out to him, and, as the coal-flap is not fastened, he is directed to put it through that coal-flap. He lifts up the coal-flap, being so directed to do. Speaking as a matter of common sense, I doubt whether any householder whatever would dream of going out to see that the coal merchants' man took the precaution to safeguard foot passengers coming along the road against putting a foot or a leg down the hole formed by the removal of the cellar-flap. If I am to consider degrees of responsibility, it seems to me common sense that no householder would think he had much to do with that. However, whether he would think so or not, the fact remains that in law, as he has contracted for something to be done on the highway which must create a dangerous situation unless precautions are taken, he is under a liability to see that such precautions are taken as are reasonable for the safeguarding of foot passengers. However often he, like many others, may neglect to do that, the fact remains that, in the eyes of the law, he has some responsibility for seeing that some sort of precautions are taken for safeguarding foot passengers against the danger which he has directed shall be created. I cannot think, however, that the degree of responsibility, in those circumstances, would be other than a small one, because, although what he, the householder, directed should be done must create a danger, in so far as it results in there being a hole in the highway, it need not, if proper precautions are taken, be such an operation as would result in any danger to anybody taking reasonable care for his own safety.

I think it is true, as Mr. Quintin Hogg has submitted, that the householder, in the circumstances, delegates to a person who should have, and presumably had, and still has, knowledge of the delivery of coal in this way, the delivery of coal in a way which is usual, and reasonably expects him to take the reasonable precautions, and the responsibility
A rests far more on the coal merchant, who, in such circumstances, does not take reasonable precautions to safeguard foot passengers after the cellar-flap has been opened, than it rests on the householder, who merely says: "There is the cellar-flap. Open it and put in the coal."

In the circumstances, although I am of the opinion that the second
B defendant has not a right to indemnity, I think that under the section I have to fix the contribution having regard to the extent of that person's responsibility for the damage, and I think that the second defendant's responsibility is rightly to be fixed at one-tenth, as against nine-tenths for the first defendant.

C It is observed by Mr. Quintin Hogg that, on the pleadings as they stood, once it was found that the act of opening the cellar-flap at the direction of the householder was within the scope of the authority delegated to the coal merchant, there was, on the pleadings, nothing that entitled the first defendant any longer to resist his claim for com-
D plete indemnity. However, I think that in this case, having regard to the specific allegation which the first defendant makes against the second defendant, he is entitled to some contribution, because he opened the cellar-flap at the express direction of the second defendant, and therefore it is still open to him to say that he is entitled to a contribution,
E as he does say, and as I have found.

The only other thing I have to deal with is the question of the costs of the second defendant in defending these proceedings, and the costs of the third-party proceedings. As far as the costs of defending the proceedings are concerned, of course I cannot grant the indemnity, because
F I have found that the first defendant is entitled to a contribution as against the second defendant, and there was a division of responsibility between them, and, in those circumstances, it does not seem to me that it would be right to say that the first defendant should pay the second defendant's costs of defending the proceedings. The declaration with
G regard to contribution will cover, not only the amount of damages recovered by the plaintiff, but also costs.

We now come to the question of the costs of the third-party proceedings, and it occurs to me that, although the first defendant puts in a claim for contribution against the second defendant and the second defendant
H puts in an answer and counterclaim, the second defendant might very well have put in a claim for contribution or indemnity, and I do not think that the mere fact that the first defendant put in his claim in that way, and that the answer happens to be in favour of the second defendant, enables me to deal with it as if it were the pleading of the first defendant. I think the real contest as between the two defendants

has been as to what extent there should be a contribution in regard to the responsibility down to the opening of the flap, at any rate, which is said to be a responsibility shared equally by the second defendant. I do not think Mr. Laskey put it higher than that, but I think he put it as high as that his opponent should contribute one half. In those circumstances, there has been a contest, and in this particular case the A second defendant has so nearly succeeded in putting the whole responsibility on Mr. Laskey's client, that I think the best way of dealing with it is to say that the second defendant is to have nine-tenths of the costs of the proceedings as between him and the first defendant.

Solicitors : *Sheffield, Powell & Scott Tucker* (for the plaintiff) ; *Withall* B *& Withall* (for the first defendants) ; *Westbrook & Co.* (for the second defendant).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

C

FOWKE *v.* FOWKE.

[Chancery Division (Farwell, J.), **April 9, May 2, 1938.**]

Husband and Wife—Marriage—Annulment—Separation agreement entered into between the parties prior to the decree of annulment—Whether provision D *made for the wife under the agreement was enforceable.*

The plaintiff married in 1911, and she and her husband to that marriage lived together until 1930. A separation agreement was entered into between them in 1931, under which they mutually agreed to live apart from one another and the husband agreed to pay his wife, the plaintiff, an annuity of £960, subject to the proviso that, if in any one year the said sum of £960 E should be more than one-third of the total income of the husband, then in the succeeding year the wife should receive a sum equivalent to one-third of the amount of the husband's income in the preceding year. The husband paid the annual sum to the plaintiff down to the date of his death, but did not comply with the terms of the settlement as to the transfer of certain shares and the payment of Rs. 200,000 to the trustees. Subsequent to the agreement, in 1933, the husband obtained a decree F absolute of nullity of his marriage, on the ground of the plaintiff's incapacity to consummate the marriage, and in the same year married the defendant, who, on his death in 1934, became his legal personal representative and the sole beneficiary under his will. The defendant contended that the decree of nullity had the effect of putting an end to the separation agreement and that there was no obligation to pay the G annuity, which she refused to do. She further contended that the agreement was one which was entered into under a common mistake of the parties that they were in truth husband and wife, and, if that were not so, there was, in the circumstances, a total failure of consideration, as the whole basis of the agreement was that the parties were married. The plaintiff maintained that, although the marriage had been annulled, the agreement having been made before the decree of nullity, the estate H continued to be liable to pay the annuity :—

Held : (i) the agreement was one which the plaintiff was entitled to enforce.

(ii) it had not been entered into under a common mistake, as there was no mistake of fact with regard to the non-consummation of the marriage. Any mistake there had been was one of law.

(iii) at the date of the agreement, the husband was under an obligation to support and maintain his wife, and she had rights to pledge his credit if he did not do so. The variation of these was a sufficient consideration for the agreement.

(iv) the husband's estate was entitled to the benefit of the provision for the reduction of the annuity when £960 was more than one-third of the total income.

A **[EDITORIAL NOTE.** Although the basis of a decree of nullity of marriage is that there never was a marriage at all, yet it has been established by a long line of authorities that, even after such a decree has been obtained, the *de facto* marriage must for many purposes be recognised by the courts. The present case considers the application of this doctrine to a separation agreement entered into between the parties before the nullity suit was commenced. The deed is attacked on two
B grounds. It is first said that it was entered into under a mistake of fact, the mistake being that the parties were married persons. It is also said that there was no consideration for the deed. Both these contentions are rejected.

AS TO THE EFFECT OF A NULLITY DECREE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937; and FOR CASES, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2326-2345.]

C Cases referred to:

(1) *Re Wombwell's Settlement, Clerke* v. *Menzies*, [1922] 2 Ch. 298; 27 Digest 457, *4752*; 92 L.J. Ch. 18; 127 L.T. 295.

(2) *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29; Digest Supp.; 100 L.J.P. 16; 144 L.T. 212.

(3) *Turner* v. *Thompson* (1888), 13 P.D. 37; 11 Digest 332, *214*; 58 L.T. 387.

D (4) *G.* v. *M.* (1885), 10 App. Cas. 171; 27 Digest 351, *3339*; 53 L.T. 398.

(5) *Bell* v. *Lever Bros., Ltd.*, [1932] A.C. 161; Digest Supp.; 101 L.J.K.B. 129; 146 L.T. 258; *revsg.*, [1931] 1 K.B. 557.

(6) *Nepean* (*otherwise Lee Warner*) v. *Nepean*, [1925] P. 97; 27 Digest 519, *5610*; 94 L.J.P. 42; 133 L.T. 287.

(7) *Newbould* v. *A.-G.*, [1931] P. 75; Digest Supp.; 100 L.J.P. 54; 144 L.T.
E 728.

(8) *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149; 35 Digest 93, *27*; 16 L.T. 678.

(9) *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.*, [1934] A.C. 455; Digest Supp.; 103 L.J.P.C. 115; 151 L.T. 309.

(10) *Galloway* v. *Galloway* (1914), 30 T.L.R. 531; 27 Digest 224, *1948*.

(11) *Law* v. *Harragin* (1917), 33 T.L.R. 381; 27 Digest 224, *1949*.

F (12) *Dormer* (*otherwise Ward*) v. *Ward*, [1901] P. 20; 27 Digest 521, *5629*; 69 L.J.P. 144; 83 L.T. 556.

(13) *Davies* (*otherwise Mason*) v. *Davies*, [1935] P. 58; Digest Supp.; 104 L.J.P. 9; 152 L.T. 264.

(14) *Dodworth* v. *Dale*, [1936] 2 K.B. 503; [1936] 2 All E.R. 440; Digest Supp.; 105 L.J.K.B. 586; 155 L.T. 290.

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ACTION by the plaintiff for (i) a declaration that on the true construction of a separation deed dated Feb. 10, 1931, and a bond of the same date, or one or other of them, and in the events which have happened, the defendant is bound to pay to the plaintiff out of the
H estate of the covenantor an annuity of £960; (ii) the payment of £2,720 arrears of the said annuity, and interest thereon.

R. M. Wilson for the plaintiff.

William Latey and *Andrew Clark* for the defendant.

Wilson: A marriage is voidable if incapable of consummation. Here there was a valid marriage which subsisted for twenty years, and there cannot be any mistake, as alleged in the defence, as to its validity. If there was any misapprehension by the parties as to their rights, such mistake was not one which would invalidate the agreement. In fact two years later one of the parties chose a method of disposing of the marriage. The state of mind of the parties at the relevant date is unknown to us. [Counsel referred to *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (2), *Turner* v. *Thompson* (3), *G.* v. *M.* (4), *Bell* v. *Lever Bros., Ltd.* (5); and to Halsbury, Hailsham Edn., Vol. 10, p. 640, and to Anson on Contract, 18th Edn., p. 153.] A

Clark: There is no subsisting marriage until the marriage has been consummated, although to the outside world it is a valid and subsisting B marriage. Here there was never any marriage between the parties. Where a settlement or marriage contract has been made, on the marriage being declared null and void, all such settlements come to an end. The post-nuptial settlement here is one without consideration, as the consideration was the existence of a valid marriage and the undertaking C by each party to refrain from exercising his or her rights. There is a statutory jurisdiction in the Divorce Court—the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192—to vary ante-nuptial and post-nuptial settlements. Any possible relief of a financial nature which the plaintiff might have obtained from the divorce court, as in *Nepean* D (*otherwise Lee Warner*) v. *Nepean* (6), has now been lost, through her neglect and through the death of the covenantor. [Counsel referred to *Newbould* v. *A.-G.* (7), *Re Wombwell's Settlement* (1), *Cooper* v. *Phibbs* (8), *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.* (9), *Galloway* v. *Galloway* (10), *Law* v. *Harragin* (11).] E

Wilson, in reply: The result of these cases is that there is a valid marriage until it is annulled. The party who ought to have sought a variation of the settlement was the person who was trying to impeach it—namely, the husband. There could have been no mistake of fact as regards the non-consummation of the marriage. If the parties had F no knowledge of the possibility of the husband obtaining a decree of nullity, it was a mistake of law. [Counsel referred to *Dormer* (*otherwise Ward*) v. *Ward* (12), *Cooper* v. *Phibbs* (8), *Davies* (*otherwise Mason*) v. *Davies* (13), *Dodworth* v. *Dale* (14), and *Law* v. *Harragin* (11).]

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Farwell, J.: The facts, which are not in the least in dispute, are these. On May 17, 1911, a marriage was solemnised in London between Edith Crammond Fowke, then a spinster, and Roger Warburton Fowke, who has since died, and thereafter the lady and Roger Warburton Fowke lived together, both in this country and in Ceylon. In the course of H 1930, as the result of unhappy differences between the parties, Roger Warburton Fowke commenced proceedings in Ceylon for a judicial separation. That matter was never adjudicated upon, because, on Feb. 10, 1931, an indenture, to which I must refer in detail in a moment, was entered into by agreement between the parties, and on that date the proceedings for judicial separation came to an end without any order being made at all, and each party paid his or her own costs.

The separation agreement which was entered into was, so far as it is relevant, in these terms. It was made between Roger Warburton Fowke of the first part, and the lady, who is described as his wife, Edith Crammond Fowke of the second part, and Philip Fowke and Nigel Inglesant Lee of the third part. It recites that unhappy differences have arisen between the husband and wife. I call them husband and wife for the sake of brevity and without pre-judging anything. The agreement further recites that they have mutually agreed to live apart from one another, that the husband has agreed to pay the wife the annuity hereinafter mentioned during her life for her maintenance and support, subject, nevertheless, to the provisoes and conditions hereinafter contained. Then the indenture witnesseth :

> (1) that in pursuance of the agreement and in consideration of the premises the husband hereby covenants with the wife and also as a separate covenant with the said Philip Fowke and Nigel Inglesant Lee, as follows : (*a*) that the wife may at all times hereafter live apart from the husband as if she were unmarried and that she shall be free from the control and authority of the husband and may reside in such place or places and either in or out of business and in such manner as she shall think fit ; (*b*) that the husband shall not in any manner annoy, molest, disturb or interfere with the wife in her person or business or in her manner of living nor at any time hereafter require or by any means either by taking out citation or process or by instituting any action in England or elsewhere or otherwise endeavour to compel the wife to cohabit with the husband or to enforce any restitution of conjugal rights nor shall for that purpose or otherwise use any force, violence or restraint to the person of the wife, or sue or cause to be sued any person or persons for receiving, lodging, protecting or entertaining her but she may in all things live as if she were unmarried without the restraint or correction of the husband or of any other person or persons by his consent ; (*c*) that the husband will yearly during the life of the wife on condition that and so long as the wife shall continue to lead a chaste life pay or cause to be paid to the wife or to such person or persons as she shall from time to time direct or appoint in writing, the clear annuity of £960 sterling by equal monthly payments of £80 each in advance on the 1st day of every month without any deduction whatsoever for the separate use and benefit of the wife and for her maintenance the payment for the month of February having been made on the execution of these presents. . . . Provided always that if in any year calculated from Jan. 1 to Dec. 31 during the continuance of this agreement the said annuity of £960 shall be more than one-third of the total income of the husband for such year then in the year succeeding such year in which one-third of the income of the husband was less than £960 the husband shall pay and the wife shall accept the sum equivalent to one-third of the income of the husband for such past year in satisfaction of the annuity of £960.

Then there is a provision to which I do not think I need refer, because nothing arises upon it. Then the agreement continues :

> (*d*) that the husband will within a period of five years from the date hereof deposit free of all encumbrances with the said Philip Fowke and Nigel Inglesant Lee and transfer to them and have duly registered in the books of the company the scrip for 5,000 shares in the Motor Launches, Ltd., a company incorporated under the provisions of the Ceylon joint stock companies ordinances and having its registered office in Colombo aforesaid, to be held by the said Philip Fowke and Nigel Inglesant Lee as security for the due payment of the said annuity of £960 or such lesser sum as may be payable in satisfaction thereof and in the meantime the husband will enter into a bond with the said Philip Fowke and Nigel Inglesant Lee for the payment of a sum of Rs. 200,000 as security for the payment of the said annuity which said bond shall be discharged upon the husband within five years from the date hereof depositing and registering the said scrip in manner aforesaid and from and after the death of the husband or in the event of the husband failing to pay the annuity in his lifetime the said Philip Fowke and Nigel Inglesant

> Lee shall pay to the wife the said annuity out of the income of the said sum of Rs. 200,000 or the said shares or the investments representing the same for her life and from and after the death of the wife or the determination of this agreement the said Philip Fowke and Nigel Inglesant Lee shall hold the said sum of Rs. 200,000 or the said shares in trust for the husband or if he be dead for his heirs executors or administrators. (2) In consideration of the premises the wife hereby covenants with the husband as follows: (*a*) that she will at all times hereafter keep the husband indemnified against all debts and liabilities which she may hereafter contract and from all actions and demands on account thereof and against all such costs, charges, losses, damages and expenses as may be incurred by the husband on account thereof; (*b*) that neither the wife nor any person on her behalf shall at any time hereafter molest or disturb the husband or by any means whether by taking out citation or process or by instituting any action in England or elsewhere or in any other manner compel the husband to cohabit with the wife or endeavour to enforce any restitution of conjugal rights or to compel the husband to allow her any alimony or maintenance other than the said annuity of £960.

Then there is a provision that, if the husband shall at any time be called upon to pay any debt or debts which the wife shall contract, then and in every such case it shall be lawful for the husband to retain out of the annuity of £960 or the sum paid in satisfaction thereof the amount of such debt or debts with all costs, charges and damages which he may incur on account thereof. Then there is a provision that, in case the husband and wife shall at any time thereafter by mutual consent cohabit as husband and wife, then and in such case the annuity shall be no longer payable, and the agreement and all covenants therein contained shall become void.

On the same day, a security bond was entered into by the husband. It recites the agreement which I have just read, and recites the agreement of the husband to deposit within five years the securities mentioned in the agreement, and that the husband, until he has transferred the shares, will enter into a bond for the payment of the Rs. 200,000 to Philip Fowke and Nigel Inglesant Lee, such sum to be payable as thereinafter mentioned. Then it says:

> Now this indenture witnesseth that the husband is held and firmly bound to the said Philip Fowke and Nigel Inglesant Lee in the sum of Rs. 200,000 for which payment to be well and truly made the husband doth hereby bind himself his heirs executors and administrators firmly by these presents.

Then there is a provision that, if he does deposit within five years the certificates for the 5,000 shares, the bond will become void. Then there is a provision that, on the death of the husband in the lifetime of the wife, or in the event of his failing to pay the said annuity in his lifetime, the said Philip Fowke and Nigel Inglesant Lee shall, from and out of the income derived from the Rs. 200,000 or the 5,000 shares, or the investments for the time being representing the same, so far as the same shall extend, pay to the wife the annuity payable to her under the hereinbefore in part recited agreement and from and after the death of the wife the said Philip Fowke and Nigel Inglesant Lee shall hold the shares or the rupees in trust for the persons entitled thereto under the will of the husband or for his heirs, executors or administrators.

In truth and in fact the shares have not, I think, been transferred to the trustees of the deed, nor have the Rs. 200,000 been paid, but, after the date of that agreement, the husband continued to pay the annual sum to the wife down to the date of his death. On Dec. 4, 1933, however, the husband obtained in the Divorce Court a decree absolute of nullity of his marriage to the respondent, on the ground of the wife's incapacity to consummate the marriage, and in Dec., 1933, the husband A married again, and he married the defendant to this action, who is his legal personal representative and the sole beneficiary under his will.

The decree absolute is in the common form, I have no doubt, but it is a form which I ought to read, because something may turn upon it. It is in this form:

> B Referring to the decree made in this case on May 22, 1933, whereby it was ordered that the marriage in fact had and solemnised on May 17, 1911, at the parish church of St. Luke Chelsea in the county of London between Roger Warburton Fowke the petitioner and Edith Crammond Fowke otherwise Steven (then Steven spinster) the respondent be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever by reason of the incapacity of the said respondent to consummate the said marriage and the said petitioner be C pronounced to have and to be free from all bond of marriage with the said respondent unless sufficient cause be shown to the court why the said decree should not be made absolute within six months from the date of the said decree and no such cause having been shown the court on application of the said petitioner by its final decree pronounced and declared the said marriage to be and to have been absolutely null and void and that the said petitioner was and is free from all bond of marriage with the said respondent.

D In those circumstances, the question has arisen whether this separation deed is any longer binding upon the executors of Roger Warburton Fowke. It is said that the fact that the marriage has been declared null and void by a decree of nullity has the effect of putting an end to this agreement, so that there is no obligation now upon the executors E to pay the annuity or any part of it. I think that it is plain on the authorities that the divorce court would have had jurisdiction to deal with this settlement as a post-nuptial settlement, notwithstanding that the decree was a decree of nullity, and not a decree of divorce. The authorities seem to establish that the court can entertain such an application F to deal with a settlement in a case of this sort, and that the court will entertain it, and, had there been an application by the husband during his lifetime, it may be that the court would have seen fit to make some order about the matter. In fact, however, no step of that sort was taken. The husband was content, apparently, to go on paying the G annuity to his first wife down to the time of his death, and he did not avail himself of any right he might have to apply to the divorce court for variation of the settlement.

The question, which I think is not wholly without difficulty, is this. It is said that this agreement was an agreement entered into under a H common mistake of the husband and wife that they were in truth husband and wife, and that, even if that is not so, in the circumstances there was no consideration for the agreement, because the whole basis of the agreement was that the parties were married, and, as married people, had certain rights one against the other, and those rights were being released—in part, at any rate—by this document, and that, if they never were man and wife at all, so that the obligations never arose, there was no consideration for the agreement to pay the annuity which the husband agreed to pay by this deed, and accordingly the husband's executors are now entitled to a declaration that the deed is null and void, and to have it delivered up for destruction.

On the other hand, it is contended that, although the marriage has been annulled, the agreement having been made before the decree of nullity, the executors cannot escape from the obligations, but the estate continues to be liable as a debtor to find the money which is properly payable in each year.

It was suggested late in the day that the husband's executors might be estopped from denying the validity of this agreement. It was said that the husband had proceeded on the footing, down to the time of his death, that this agreement was a binding agreement, and that it was too late now for the executors to object that the agreement was not binding, and had never been binding upon him. Estoppel was not pleaded in this case, and I do not think that it would be right for me to decide this matter on that ground.

The whole of the difficulty in this case arises, in my view, from the rather unusual position which arises where two persons go through a ceremony of marriage, both of them being, apart from any physical disability, free to contract marriage. That is to say, there being no question of bigamy, or anything of that sort, they go through a ceremony of marriage, but that marriage is not consummated, and subsequently there is a decree declaring the marriage null and void. The position of two persons in those circumstances is not wholly free from difficulty. It is, I think, clear that, in order to constitute a valid marriage according to the law of this country, it is necessary to prove, first, a ceremony—not necessarily a religious ceremony, but such a ceremony as is provided by law—and, secondly, consummation. I am not, of course, referring at all to any question of marriage by reputation, or anything of that sort. I am speaking of a legal marriage. Those two things are necessary to constitute a legal marriage in our law. If the marriage is not consummated, there is then no marriage in fact, and the person aggrieved can, by appropriate proceedings in the divorce court, get a declaration that there is no marriage—that is to say, a declaration of nullity—not merely a declaration that the marriage has determined from any particular date, or is dissolved from any particular date, as in the case of divorce, but a declaration that the marriage is and has been absolutely null and void, and that the petitioner was and is free from all bonds of marriage with the respondent.

The result of that is that—at any rate, as from the date of the decree absolute—in proceedings for divorce on the ground of nullity for incapacity, the parties are not, as from that time, and never have been, strictly man and wife. That is to say, the necessary conditions for marriage in this country have never been fulfilled. Of course, in that respect, the position of the parties in an action of that kind differs wholly from that where, the parties having married legally and then lived together and consummated the marriage, one or other of them obtains a divorce upon the ground of some misconduct justifying the court in granting a decree of divorce. The effect of such a decree, of course, is merely to dissolve the contractual rights between the parties as from the date of the decree, and does not in any way affect the position of the two people as having been legally man and wife down to the date of the decree, and the decree itself can in no way affect the position, or prevent it from being that the two persons in question have been man and wife, and, although they are no longer man and wife, and no longer under the mutual obligations arising from that relationship, they are none the less persons who have been married, and have been man and wife in the legal sense of the word. On the other hand, as I have pointed out, in the case of a nullity decree, the position is that there has never in law been a marriage at all. The parties have never been in law man and wife. Again the position differs, in my judgment, from that flowing from a decree of nullity on the ground of bigamy. In that case, bigamy being a criminal offence, a person who contracts a bigamous marriage contracts no marriage at all, and the union between the two parties can never be said to be, at any time, a union of two people as man and wife in the state of wedlock. It is impossible for a bigamous person, a person who has a spouse living and not divorced (to whose first marriage an end has not been legally put), to enter into a second marriage at all, and there can be no marriage of two persons who contract a bigamous marriage, who live together and are open to attack from anyone in the word who desires to impeach the validity of this suggested marriage. Any person can give information which may lead to the prosecution of the guilty party for bigamy, or may take other steps in the matter, and may disregard wholly the fact that a marriage ceremony, or a ceremony which otherwise would have amounted to a marriage ceremony, has been gone through.

The difference between that case and the case of persons who are married but whose marriage has never been consummated is quite plain. In the case of persons who, being (apart from physical disability) free to marry, have gone through a ceremony of marriage, and are living together, those two persons are, so far as everyone in the world is concerned, except themselves, man and wife, in the sense that no one can be heard to say that they are not legally married. To allege of two such persons, before any decree of nullity has been made, that they are living in sin would, I apprehend, be slanderous, and would be an allegation which might give rise to a cause of action for damages on the part of one or other of the parties, or on that of both parties. Moreover, their position is that of man and wife from all material points of view. The husband, for instance, is bound to maintain the wife, and the wife, if she is not maintained, is entitled to pledge his credit, and, if she pledges his credit, and a tradesman then sues the husband for the amount, it is not open to the husband in those proceedings to set up that the lady is not his wife at all, nor is it open to the tradesman to set up that there never has been a marriage at all. So long as neither the husband nor the wife has taken proceedings in the divorce court and got a decree of nullity pronounced, those two persons are, although both conditions of marriage have not been fulfilled, to all intents and purposes married people. The moment the decree of nullity is pronounced, however, the position becomes wholly different. There is then no marriage, and never has been a marriage. That is well illustrated by such a case as *Re Wombwell's Settlement, Clerke* v. *Menzies* (1). In that case, two parties were intending to get married, and a settlement was made under which the father of one of the parties settled a sum of money to be held upon trust for him until the marriage, and after the marriage upon trust for the beneficiaries under the trust—the usual marriage settlement. The parties went through a ceremony of marriage, and subsequently lived together, but the marriage was not consummated, owing to the incapacity of the husband. The wife duly obtained a decree of nullity, and on that the settlor claimed that he was entitled to recover the stocks and shares which he had transferred to the trustees of the marriage settlement, on the ground that there never had been a marriage at all, and, as the trust was for him until marriage, he was the only beneficiary who was entitled to the funds, and he could call upon the trustees to hand over the funds to him. RUSSELL, J., held that the claim was well-founded, but he was careful to point out that neither party desired to make any application to the divorce court to have the settlement varied, which they clearly could have done, and it was only the fact that neither of the parties was proposing or intending to make any such application that enabled him to direct the trustees, as he did, to re-transfer the securities to the settlor. The ground of the decision, in my judgment, is plain—that, the decree *nisi* and the decree absolute of nullity having been made, the judge said that there never had been a marriage at all, and, there never having been a marriage, then the only trust of the settlement which was effective was the trust for the settlor, who, being the sole beneficiary, was entitled to have the funds back. That illustrates the fact that the marriage is not a marriage. Once the decree of nullity has been made, the marriage is not, and never has been, a legal marriage at all.

I think that a similar result was arrived at in *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (2), or that that case is really on the same ground—namely, that there never was a marriage at all. None the less, however, the position, odd as it may seem, is in my judgment that, notwithstanding the fact that it is ultimately decided that there is no marriage, until that is decided and the decree has been made, the parties are man and wife, and are living in wedlock to all intents and purposes. They themselves are treated, and must be treated, as man and wife, and their dealings with the outside world, with third parties, can be only on the footing that they are man and wife; and, if two persons go through a ceremony of marriage and live together until the death of one of them, neither of them taking proceedings to get a decree of nullity, although the marriage has never been consummated, and therefore one of the conditions of marriage has not been fulfilled, they remain for all time having the status of married people, and the obligations and benefits which flow from that status are theirs, and the fact that the marriage has not been consummated cannot be set up by anyone, and their position is intact. Thus, whereas, as I have said, in the case of a bigamous marriage, anyone may attack the validity of the marriage, anybody may treat the parties as not married if that person can prove the bigamy, and in no sense and for no purpose whatsoever are those two people who have joined together in a bigamous marriage man and wife, in the case of a marriage of this sort, as I have said, to all intents and purposes their position is that of man and wife, and the results which would flow from that position are the same as those in the case of any other legal marriage, unless and until a decree of nullity is pronounced.

If that be true, then I have to consider the position of the parties *vis-à-vis* an agreement entered into by them between themselves during the time when they are living as man and wife and before any decree of nullity has been made, or before there has been any question of any such decree being made. In this case, as I have said, the parties, as a result of unhappy differences, were contemplating living apart. They were contemplating regularising their position of living apart by obtaining a judicial separation. Instead of that, however, that in fact was never done, and no order for judicial separation was made, but this agreement was entered into, which was honoured by the husband down to the time of his death, and which the first wife now claims must still be honoured by the executors. It is said that this agreement is not enforceable now—and, I think it must follow, was not enforceable at any time after the decree absolute had been made—because the whole foundation of this contract was that the husband and wife were husband and wife. It is said that it was in order to relieve the parties from the obligations resulting from that status, so far as was possible apart from a divorce or decree of nullity, that this document was entered into. It is said further that, in those circumstances, there was no consideration for this agreement, and that it is not binding upon them.

In my judgment, this agreement is one which the first wife is still entitled to enforce. It is, I think, impossible to say that this was an agreement entered into under a common mistake of fact such as would entitle either party to have it declared void. In the first place, there was no mistake of fact—there could have been no mistake of fact—so far as the fact consisted in the non-consummation of the marriage. Both parties must have been perfectly well aware of that. They knew that this marriage had not been consummated. Whether either of them knew, when they entered into this deed, that the husband would have the right, in certain circumstances, to obtain a decree of nullity in the divorce court is a matter of which I know nothing. However, that ignorance, if there was such ignorance, in my judgment is clearly a mistake of law, and not a mistake of fact. The relevant fact was known to both parties, and, in those circumstances, it seems to me impossible to say that this was an agreement entered into by the parties under such a common mistake of fact as would entitle the court to set it aside. Further than that, the position between the parties was, at the time when this document was entered into, such that they were, as I have said, married persons for all purposes. So far as outsiders were concerned, their status was that of married people. The husband was under an obligation to support and maintain his wife. The wife had rights to pledge his credit if he did not provide her with maintenance. Those rights were existing rights at the date of this document, and rights which the parties were entitled to enforce. It would have been, as I have said, impossible for a person giving credit to the wife to set up subsequently that there was no marriage between the parties, unless and until, of course, a decree of nullity had been made. So long as the position was that there was no decree of nullity, it was impossible for anyone, including the parties themselves, to put themselves in any position which was inconsistent with their status as man and wife. I say that because, in my judgment, it is plain that the only place in which the person aggrieved, in a marriage of this kind, can assert it is in the divorce court, in proper proceedings for that purpose, and it is not for the person aggrieved, be it he or she, to set up the invalidity of the marriage in any proceedings between themselves and third parties, or in any proceedings other than the appropriate proceedings in the divorce court. Thus, it is not true to say that, although there was not a marriage in the legal sense of the word, the status of the parties was so different from that of married people as to render this agreement one for which there was no real justification at all. These two people were not in the position of two persons who had contracted a bigamous marriage. They were persons who, in the eyes of the law and in the eyes of everyone else, were man and wife until the date when a decree absolute was made, and, in those circumstances, an agreement entered into on the basis that they were man and wife, and at a time when there was no question of a decree of nullity, is, in my judgment, a contract which would remain enforceable even though subsequently the husband obtains the decree which he did obtain in this case.

Further, in my judgment, it is impossible to say that there is no consideration for this agreement. It is plain, as I have pointed out more than once in my judgment, that the lady could have pledged her husband's credit and that the husband would have been liable—that is, before the decree absolute was made. The wife was abandoning that right to pledge his credit in consideration, among other things, of the yearly payment. The husband was putting himself in a position where he was getting, as a consideration for the agreement, the right to prevent his wife from pledging his credit, and, in any action which a person who gave credit to the wife chose to bring against the husband, on the ground that she had acted as his agent to contract such a debt, the husband would have an answer, and a complete answer, in this separation deed. He would thereby obtain the benefits of the separation deed, and, certainly throughout the whole period until the decree absolute was made, the husband obtained the advantage and the benefits of being relieved from a liability, if his wife attempted to pledge his credit—a liability from which he could not otherwise have divorced himself—and the wife obtained, as part of the consideration moving to her, the yearly sum which this agreement provides.

In my judgment, therefore, it is not possible to say that this agreement is one which is not enforceable, first, on the ground that it was entered into under such a common mistake as would justify the court in setting it aside, or, secondly, on the ground that there was no consideration to support the agreement. Further, it must be borne in mind that for several years, from 1931 down to the date of the death of the husband, and for some period even after the decree absolute had been made, the agreement was binding upon the wife, on receiving the yearly income payable to her, not to pledge his credit, or to attempt to pledge his credit. It seems to me that on that ground it must be true to say that this is an agreement which cannot be set aside, because it is not possible to make *restitutio in integrum*, which is a necessary condition of setting aside such an agreement. In the circumstances, I have come to the conclusion that this agreement is one which is binding on the executors of the husband, and must be honoured by them.

That leaves me only quite a short question of construction of the agreement to deal with—the question whether the provision in the agreement, which reduces the liability of the husband to pay the £960 a year to paying the equivalent of one-third of the income, is one which applies after the death of the husband as well as before. It is to be noticed that, in the various covenants into which the husband enters in this document, to pay the annuity, and the other covenants into which he enters, he enters into them under his own name, and the words "legal personal representative or assigns," or anything of that sort, are not included at all. Notwithstanding the omission of such words, however, it has rightly not been contended that the liability to pay the annuity ceased at the death of the husband. It is appreciated, rightly, that the liability of the husband is not limited to his lifetime, but extends after his death during the lifetime of the first wife, and that, consequently, the annuity is still payable.

If the true view be, as I have no doubt whatever that it is, that the husband's estate remains liable, and that his executors are under the obligation to honour the covenants of the husband so as to cast a burden upon the estate, I myself wholly fail to see why they are not entitled to have the benefit of the relief which is given to the husband by this provision as to reduction of the annuity. I do not think that I can say that, whereas the husband was under the obligation, and entitled to that relief, the executors are in so much worse a position that they remain under the liability, but are not entitled to the relief which their testator would have had. I can see nothing in the document itself which would compel me to come to a conclusion which I confess I think would be an unjust conclusion if I were compelled to come to it. It may be that the parties could have provided for such a position if they had desired to make the annuity payable at the full rate after the death of the husband, but there is nothing in the document, to my mind, which imposes on me any obligation to find that the executors are not entitled to relief to the extent which I have stated, and I have come to the conclusion that, on the true construction of the document, if, say, at the end of the year in which the testator died, one third of the income was less than £960, then the executors' liability was accordingly reduced, and in each year succeeding the year of his death the executors again, if one third of the income of the whole of the estate is less than £960, are entitled to the relief which is given by the settlement.

That really disposes of the action, and, so far as the action is concerned, I think that probably the best way will be to make a declaration that, on the true construction of the separation deed, and in the events which have happened, the defendant is bound to pay to the first-named plaintiff out of the estate of the covenantor the clear annuity of £960 during the life of the plaintiff, or the amount equivalent to one-third of the income of the estate for the preceding year, during the life of the plaintiff so long as she shall continue to live a chaste life. I think that that is really all, unless I am asked to make some order with regard to the costs. The plaintiff, of course, is entitled to the costs of the action, and, in the circumstances, the counterclaim must be dismissed with costs.

Solicitors: *G. F. Wilkins* (for the plaintiffs); *Pickering, Kenyon & Co.* (for the defendant).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

BARNES *v.* IRWELL VALLEY WATER BOARD.

[Court of Appeal (Greer, Slesser and MacKinnon, L.JJ.), **May 3, 4, 5, 1938.**]

Water Supply—Domestic purposes—Purity of supply—Pure while in mains—Water dissolving lead—Statutory duty—Common law duty to warn persons supplied.

The plaintiffs were supplied with water for domestic purposes by the defendant water board. It was proved that the water was pure so long as it was in iron pipes, but in its passage through lead pipes it dissolved lead and became poisonous. The only lead piping through which the supply was passed was a length of 6 ft. before the stop-cock was reached, and the pipes upon the plaintiffs' premises, which had been inspected by the board. The plaintiffs, by drinking the water supplied, had contracted lead poisoning :—

HELD : (i) the board had not been guilty of any breach of statutory duty, as the supply of water up to the turncock was pure and wholesome.

A (ii) the board had been negligent, in that it should either have taken steps to reduce the plumbo-solvency of the water, or have warned consumers that the water, if passed through lead pipes, was liable to be dangerous to health. The plaintiffs were therefore entitled to recover.

Decision of Mr. Comr. HENN COLLINS, K.C. ([1937] 4 All E.R. 675) *affirmed.*

[EDITORIAL NOTE. The Court of Appeal have here upheld the decision in the court below, but have taken the view that that decision ought not to have been B based upon the *dictum* in the well-known judgment of BRETT, M.R., in *Heaven* v. *Pender* (1). That has often been criticised, and the Court of Appeal here say that it is no longer a proper statement of the law. They agree, however, that the common law imposes a duty upon a water board to warn users where the water may become injurious in circumstances which are likely to happen, e.g., by reason of its being passed through lead pipes.

C AS TO PURITY OF WATER SUPPLY, see HALSBURY, 1st Edn., Vol. 28, Water Supply, pp. 299, 300, para. 552 ; and FOR CASES, see DIGEST, Vol. 43, p. 1078, Nos. 132-138.]

Cases referred to :

(1) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503 ; 36 Digest 8, *9* ; 52 L.J.Q.B. 702 ; 49 L.T. 357.

D (2) *Milnes* v. *Huddersfield Corpn.* (1886), 11 App. Cas. 511 ; 43 Digest 1078, *136* ; 56 L.J.Q.B. 1 ; 55 L.T. 617.

(3) *M'Alister* (*or Donoghue*) v. *Stevenson,* [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.

E (4) *Levy* v. *Langridge* (1838), 4 M. & W. 337 ; 39 Digest 458, *852* ; *sub nom Levi* v. *Langridge,* 7 L.J.Ex. 387 ; *affg.* S.C. *sub nom. Langridge* v. *Levy* (1837), 2 M. & W. 519.

(5) *Le Lievre* v. *Gould,* [1893] 1 Q.B. 491 ; 36 Digest 10, *26* ; 62 L.J.Q.B. 353 ; 68 L.T. 626.

(6) *Farr* v. *Butters Bros. & Co.,* [1932] 2 K.B. 606 ; Digest Supp. ; 101 L.J.K.B. 768 ; 147 L.T. 427.

F (7) *Otto* v. *Bolton & Norris,* [1936] 2 K.B. 46 ; [1936] 1 All E.R. 960 ; Digest Supp. ; 105 L.J.K.B. 602 ; 154 L.T. 717.

(8) *Hammond* v. *St. Pancras Vestry* (1874), L.R. 9 C.P. 316 ; 38 Digest 25, *135* ; 43 L.J.C.P. 157 ; 30 L.T. 296.

(9) *Stretton's Derby Brewery Co., Ltd.* v. *Derby Corpn.,* [1894] 1 Ch. 431 ; 38 Digest 26, *140* ; 63 L.J.Ch. 135 ; 69 L.T. 791.

G APPEAL from a decision of the Hon. S. O. HENN COLLINS, K.C., sitting as a commissioner of assize at the Manchester Michaelmas Assizes, dated Dec. 3, 1937, and reported in [1937] 4 All E. R. 675. The facts of the case are fully set out in the judgments.

H *Maxwell Fyfe, K.C.,* and *P. Redmond Barry, K.C.,* for the appellants.

G. J. Lynskey, K.C., and *C. H. Stafford* for the respondents.

Fyfe, K.C. : The only duty of the water board is to have pure and drinkable water in their mains. That they did. The *dictum* in *Heaven* v. *Pender* (1) here relied on is too wide, and is not supported by authority. The decision in *M'Alister* (*or Donoghue*) v. *Stevenson* (3) does not govern this case. The liability here is defined by statute, and there is no further liability. The statute provides, not only the existence of the duty, but also the standard of duty. It was necessary to warn consumers only if some duty was owed. The only duty would be to warn if they knew that the water was definitely dangerous. [Counsel referred to BEVAN ON NEGLIGENCE, 4th Edn., Vol. 1, p. 204; SALMOND ON TORTS, pp. 551, 458; *Milnes* v. *Huddersfield Corpn.* (2), *Farr* v. *Butters Bros. & Co.* (6), *Otto* v. *Bolton & Norris* (7), and *Hammond* v. *St. Pancras Vestry* (8).]

Redmond Barry, K.C.: There was here a statutory body doing what the statute told it to do—namely, to acquire water, collect it, and deliver it through mains. Common law obligations cannot always be imposed on a statutory body: *Stretton's Derby Brewery Co., Ltd.* v. *Derby Corpn.* (9).

GREER, L.J.: I would like to say at once that there is a mistake in the judgment in placing too great reliance upon what was said by BRETT, M.R., in *Heaven* v. *Pender* (1). That was a mistake, because it has been frequently held—as is pointed out in a number of cases cited in BEVAN ON NEGLIGENCE—that that statement of the law was wider than was justified by the law as it had been established up to the time when BRETT, M.R., made the broad statement of the law that he made in *Heaven* v. *Pender* (1). However, it does not follow that, because that mistake was made by the judge, his conclusion in the case was wrong, and not supported by the law of this country.

If one looks at *Milnes* v. *Huddersfield Corpn.* (2), which was very much relied upon by the appellants in this case, one finds a statement by one of the dissenting Lords. The case was curious, from the fact that the EARL OF SELBORNE and LORD WATSON came to the conclusion that there had been a breach of the statutory duty and that that breach had occasioned the damages which were sought to be recovered. In the course of his opinion, the EARL OF SELBORNE said that he thought it right to say that he was unable to see how the question of liability for negligence could possibly have been raised. If one looks at the opinion of LORD BLACKBURN, one finds this passage at p. 530:

> But I think that the duty imposed on the corporation does not extend so far.

That is to say, he was holding that there was no breach of duty by the corporation by reason of the fact that the only claim against them was that the water in their mains was not in accordance with what it should be. Then he says, at p. 530:

> It may be that it imposes on them a duty to take all reasonable care and skill, and, if there had been a claim for damages on the ground that they had been guilty of neglect of that duty, it would have been necessary to consider this.

If LORD BLACKBURN was right about that, he was leaving open the question as to whether or not there was a duty to exercise reasonable care, and was rather indicating, as I think, that there was such a duty, which would have to be considered in some future case. Lord Bramwell deals with the matter in the same way. He says, at p. 533 :

> I decline to consider any question of negligence or misfeasance in the use of lead pipes. No such case is before us.

Lord FitzGerald, in giving his judgment, says, referring to the Act of Parliament, at p. 534 :

> they were bound and required to supply [water] of a pure and wholesome nature, and sufficient for his domestic use [that is, for the domestic use of the tenant and his family], whereas the same water was not of such pure and wholesome nature, but contained lead, free acid, and other substances likely to injure the health of the said John Jessop Milnes.

I understand Lord FitzGerald to mean by that that there might well be considered to be a duty to provide water which would not contain lead, free acid, or other substances likely to injure the health of the tenant.

In the present case, it is admitted on the pleadings that the male plaintiff was the tenant of the premises, and, in those circumstances, though it may well be that, under arrangements between him and his landlord, the landlord paid the rates, that does not seem to me to make any difference. The question is whether or not the tenant was a person liable in law to pay the rates, as he undoubtedly was. If they were paid on his behalf by the landlord in some way or other, by repayment, or otherwise, he would have to account for what the landlord had done in regard to paying the rates on his behalf. One has to consider the question as to what the duty of the water authority was, and, in considering that, we are entitled to take into account the bye-laws which have been framed for the purpose of dealing with the duty of the water authority towards consumers.

Bye-law No. 19 says that all lead pipes must be tinned inside, of not less than certain weights, and that all the curves in the pipe must be as easy as possible, so as to keep the pipe of uniform bore. There are other provisions that the consumers' pipes are subject to inspection by the agents of the board, and I think that we are entitled to assume that the authority, up to a certain point, have done their duty by having somebody to inspect the pipes.

In these circumstances, the facts appear to be these. For 24 ft. there was, on these premises, an old pipe. Beyond that, the pipes had recently been renewed. The defendants, however, had been warned over and over again that the water passing through the old pipes was liable to be contaminated before it reached the consumer, and it seems to me not a very exaggerated inference to draw that, in these circumstances, there was a duty on the part of the board to supply their water, at the point where it is taken by the tenant, who pays the rates, in such a condition that, when used after going through the tenant's inspected pipes, it would be reasonably fit for domestic use. As pointed out, it is impossible, having regard to the decision in the case to which I have just referred, to hold that there was established any breach of their statutory duty.

That, however, does not determine the case, because we have now to consider, perhaps for the first time, whether or not there was some further duty on the part of the authority to exercise reasonable care that the water, when it reached the point of consumption in the ratepayer's premises, was reasonably fit for use at the point of user. In that connection, it seems to me right that I should rely upon the decision of the majority of the House of Lords in *M'Alister* (*or Donoghue*) v. *Stevenson* (3). In that case, it was held by all three Lords, who formed the majority of the court, that, on the part of the manufacturer who sold, for the purposes of consumption by the ultimate consumer, goods that were not reasonably safe for the purpose for which they would be used by the consumer, there was a duty to exercise reasonable care. It is quite true that Lord Thankerton refers in his opinion to the question as to when the duty arose, but I do not regard his decision as being a decision that there was no such duty, but as being only a consideration of the question as to when the duty had been performed, because the observations that he made would have been entirely irrelevant if there were no duty imposed uopn the manufacturer.

In the present case, there were two methods whereby the complaint which had been made, to the knowledge of the authority, might quite easily have been met so as to protect the consumers. One was by immediately setting about some method of reducing the plumbo-solvent in the water, by means of methods which would render it more alkaline than it was when it left their reservoirs. The other was a much simpler method, that of sending out a circular to the various users to tell them that, before they consumed the water, which had to go through the approved pipes, they ought to draw off a certain quantity before they used it as drinking water. I regard the opinion of Lord Thankerton as meaning merely that he was considering himself, not whether there was a duty, but whether that duty had in fact been performed.

The evidence, to my mind, if there was a duty, is quite conclusive that the defendants did not perform that duty. They delayed a very long time, longer than was reasonably necessary, in installing the apparatus which would have rendered the water harmless. There was no explanation of that delay. In addition to that, there was the very simple method of sending a notice to those who had any old pipes or any lead-lined pipes upon their premises to take the precaution of drawing off a certain amount of water before it was consumed for domestic purposes. In those circumstances, I think that it was no protection to them to say that they were advised by the local authority that it might be dangerous to frighten people by sending out these notices. That is, to my mind, a matter which we can leave out of consideration, because the local authority are not the final judges as to what is or what is not negligence on the part of the water authority.

I would point out that, in 1929 and onwards, until 1935, a series of complaints had been made by various occupiers of premises that they were suffering from lead poisoning. In these circumstances, it seems to me that it was open to the judge to hold that there was some duty on the part of the water authority to exercise reasonable care towards the ratepayers and towards the consumers, and it was amply proved, that they failed to exercise that reasonable care. As early as Aug. 22, 1931, the sanitary inspector wrote to the engineer and manager of the defendant board in these terms:

> Owing to complaints from one of our doctors of lead poisoning I have had a sample of water from 28, Church Street, Haslingden, analysed, which, I regret to say, shows serious lead contamination. Since this sample was taken a further case has been reported in the same locality.
>
> My committee view with alarm this constant re-occurrence of lead poisoning and I shall be pleased if you will let me have your observations on the matter.

This is on Aug. 22, 1931. Complaints had been coming in before that time. On Aug, 29, 1931, the engineer and manager of the water authority replied:

> Some three or four years ago the water board constructed lime-pits on the feeders to the Scout high-level reservoir (from which the upper part of Haslingden is supplied) as well as at other reservoirs deriving their supply from upper moorland sources, but, as these did not prove so successful as was anticipated in removing the plumbo-solvent activity of the water the board has authorised me to prepare a scheme for adding lime or chalk to the water after it leaves the impounding reservoir.
>
> As the matter will, in all probability, be discussed at the next meeting of the board, I hope to be in a position to let you have a more definite reply as to the adoption of some means of overcoming the plumbo-solvency.
>
> In the meantime, we are continuing to advise our consumers in the Church Street and neighbouring areas—where the house services were laid in a lead pipe of a very soft nature—to run a quart or so of water from the tap before drawing any for drinking or cooking purposes. Tests of water taken after this has been done show that the water so drawn is suitable for domestic use.

So far as the ratepayer, the tenant of these premises, and his wife are concerned, no notice was ever served, and no immediate steps were taken to do what was suggested by the engineer in the letter of Aug. 29. A long period of waiting took place, in which no steps were taken to protect the unfortunate people concerned, who were consuming this lead-contaminated water. I find it impossible to come to any conclusion other than that the defendants, through their agents, were negligent in reference to consumers of water in their district. I think that no distinction can be drawn between the ratepayer and his wife, who was one of the persons whom the defendants must have contemplated would be using this water for domestic purposes after it passed through the old pipe and the other portions of the pipe. I cannot find myself in a position to hold that the defendants exercised reasonable care, as I think they were bound to do, to protect the interests of those whom they were supplying with water for domestic purposes, or to protect the interests of those members of the household who were within their contemplation as persons who would be likely to use the water for domestic purposes. I said in the course of the argument, and I repeat it now, that, if there were no remedy in these circumstances, then the law of this country would be very deficient in protecting the rights of consumers of water. I do not think that I need add anything to that.

I have come to the conclusion that the judge's decision, though unfortunately based on authority which is now no longer authority, was, on the facts of this case, a correct decision as to the obligations of the water board and the failure towards those whom they knew to be consumers. I think that I may add to that that, if one looks at the correspondence, one sees there, on the part of the water board and the agents, a recognition of the obligation which I have held was an obligation imposed upon them. They were content with saying: "When the water gets to the position where the tenant may insert his pipe and take it into his premises for consumption by means of a lead pipe, it exhausts all our responsibility in the matter. We are not responsible for anything that happens after that." I think it would be lamentable if the law were such as to disable users of water for domestic purposes from saying that, if reasonable precautions had been taken, then the damage which occurred to the tenant and to his wife, who are the plaintiffs in this action, would never have happened. I think that there is an obligation upon them that reasonable precautions should be taken. For these reasons, I think that this appeal must be dismissed with costs.

Slesser, L.J.: I am of the same opinion. The undisputed fact in this case is that, at the time this unfortunate man and his wife consumed the water which rendered them ill, the authority responsible under statute for the supply of water supplied them with water which is what is called by experts plumbo-solvent. That is to say, it is of so soft a nature, and contains such chemical constituents, that, passing over lead, at any rate, of an untreated type, it is liable to absorb lead, which will ultimately be drunk by the consumer. As regards the 24 ft. of pipe leading to the consumer's premises from the main, there is no question but that this was an old pipe—it is not known exactly how old it was—a lead pipe of the old, untreated sort. The pipes in the house had apparently been treated in accordance with the regulations. In these circumstances, the question arises whether the plaintiffs so poisoned have any remedy in law against the defendants, the Irwell Valley Water Board. The case, as pleaded, was put, first, upon a breach of statutory duty to supply them with pure and wholesome water, and, secondly, upon a failure of duty at common law, constituting negligence.

As regards the first way of maintaining the case, it was not persevered with at the trial. The judge has not based his judgment upon it, and, in my view, it would not have been possible, having regard to the decision in the House of Lords in *Milnes* v. *Huddersfield Corpn.* (2), to have succeeded in that proposition. I mention that because, although in the present case the decision, as I have stated, is based upon the common law, there are observations in *Milnes* v. *Huddersfield Corpn.* (2) which have given me, at any rate, some difficulty, and have caused me some hesitation in coming to my conclusion. They are observations made by a Lord of great eminence, and must necessarily be treated with great respect. The case of *Milnes* v. *Huddersfield Corpn.* (2) closely resembles this case in its facts, in that the facts there were that water had been supplied through lead piping, and proved to be injurious to health; that analysts had examined the water; that the result of the examination was that the defendants had notice that there was, in the reservoir, free acid, which might probably make the water, after passing through lead, dangerous to health; that they took no precautions to avoid the effect, but supplied the water as before, and that, in consequence, several persons were attacked with illness. So far as the facts of one case can resemble another—subject to the observation that since that time, apparently, science has provided for these corrosive waters remedies which apparently were not known at that time—the facts of the two cases are very closely similar. That case was brought entirely upon breach of statute. As Greer, L.J., has pointed out, it is observed by all the Lords that the case was not sought to be founded in negligence. There is an observation of the Earl of Selborne, however, which is the one which, as I say, gave me some cause to hesitate in the present case. It is *obiter*, but I think that it is right here to refer to it, having regard to the conclusion of the Earl of Selborne that there was in that case a breach of statutory duty, a view which was supported by Lord Watson, but which was the view of the minority of the House, Lord Blackburn, Lord Bramwell, Lord FitzGerald, Lord Halsbury and Lord Ashbourne, on further argument, taking the view that there was no breach of statutory duty.

The Earl of Selborne says, at p. 526:

> Taking this view [that there was a breach of statutory duty], I should have arrived at a conclusion in the appellant's favour, not on the ground of negligence (as to which no question was open upon the pleadings), but on that of non-fulfilment of the statutory obligation. Not only was no question of negligence raised, but I think it right to say that I am unable to see how it could possibly have been raised (consistently with the views of the statutory obligation on which I understand the opinions from which I differ to be founded).

The views from which he differs were stated, I think, sufficiently by Lord Blackburn, at p. 531. He points out that the obligation under the Waterworks Clauses Act, 1847, s. 35, which was there incorporated, as here, by the local Act, was that the undertaking should provide and keep in the pipes a supply of pure and wholesome water sufficient for domestic use of all the inhabitants of the town or district, and should be entitled to demand a rate. Lord Blackburn continues, at p. 531:

> The only doubt I have had as to this is whether (as it was known that the supply pipes were likely to be made to some extent of lead, and after the making of the bye-laws it was known that they would certainly be made of lead) the water which when passed through the lead pipes would take up some poisonous salts of lead can properly be said to be "pure and wholesome." I think, however, it was so, and that the fault, if there was any, was in having lead pipes at all.

As I say, the Earl of Selborne appears to think that that view was inconsistent with any presumption of negligence, although the matter there was not pleaded and not considered. In my view, however, that case has now to be read having regard to the more recent methods of eliminating plumbo-solvency, and to the later developments in the conception of the law of negligence in this class of case, as now laid down by the House of Lords in *M'Alister* (*or Donoghue*) v. *Stevenson* (3).

The kind of argument which prevailed in *M'Alister* (*or Donoghue*) v. *Stevenson* (3), that—

> the law imposes on all persons who deal in dangerous commodities an obligation that they should use reasonable care, much more that they should not supply them knowing them likely to cause injury

—had been urged many years ago in *Langridge* v. *Levy* (4), but at that time the court declined to accept counsel's argument, leaving the matter open, and preferring to base the case, not on the kind of negligence indicated in *M'Alister* (*or Donoghue*) v. *Stevenson* (3), but rather upon tortious deceit. However that may be, we now have the decision of the House of Lords in *M'Alister* (*or Donoghue*) v. *Stevenson* (3) to guide us, and I would refer particularly to the opinion of LORD ATKIN, at p. 580 :

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour ; . . . and the lawyer's question, Who is my neighbour ? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

Pausing there, if it can be said that the plaintiffs here are the " neighbours " of the supplying authority, within the meaning of the *dictum* of LORD ATKIN—a matter which I will consider in a moment—there is no doubt, to my mind, that they failed to take reasonable care to avoid acts which they could reasonably foresee would be likely to injure the plaintiffs.

As GREER, L.J., has pointed out, it had already been stated before that the water which they were supplying was to their knowledge plumbo-solvent. They further knew that, the water being plumbo-solvent, it might poison drinkers, and they in fact knew that it had, since 1929, poisoned drinkers of water in this locality. In order to get a loan for the purpose of a hardening plant to harden the water, that it might no longer be plumbo-solvent, they had represented to the Ministry of Health that it was an urgent matter, in answer to a letter from the Ministry of Health, in 1932, pointing out, when there was a great need of economy, that they would sanction a loan only if the matter were urgent. They knew, therefore, that people were being poisoned by their water, and they knew that there was a method of correcting that poison, which they failed to use. There is no doubt in my mind that they failed to take reasonable care to avoid acts or omissions which they could reasonably foresee would be likely to injure the consumers who had lead pipes, and, moreover, they failed to warn the plaintiffs.

LORD ATKIN goes on at p. 580 :

> Who, then, in law is my neighbour ? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them A in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In my view, there exists in this case that relationship and reliance upon another which is indicated by LORD ATKIN, and these plaintiffs are persons thus closely and directly affected by the act of the water authority B who are under a statutory authority to supply them.

In all probability—though, as the matter has not been proved in evidence, perhaps one ought not to speculate on the matter—either the male plaintiff, who is the tenant of these premises, paid the water rate himself, or it was paid by the landlord and the male plaintiff suffered C some increase of rent, or by some other method recouped the landlord for providing him with water. He appears on the evidence not to have been a mere manager put in, but a person who, with his own savings, paid rent for this house. I am not at all sure (there is not sufficient evidence to decide it) whether the real relationship between the parties was not D actually a contractual one. So far as concerns the male plaintiff, he was probably paying for water to be supplied to him through these lead pipes, for the use of himself and his family. He was not paying for poison. However that may be, and I do not base my decision thereon, it is quite clear to my mind that, though there be no contractual relation, E the case comes within *M'Alister* (*or Donoghue*) v. *Stevenson* (3), and also within the *dictum* of COTTON, L.J., in *Heaven* v. *Pender* (1), at p. 517 :

> . . . anyone who leaves a dangerous instrument . . . in such a way as to cause danger, or who without due warning supplies to others for use . . . [a] thing which to his knowledge . . . is in such a condition as to cause danger, not necessarily incident F to the use of such . . . [a] thing, is liable for injury caused to others by reason of his negligent act.

In my opinion, it is right to say that the plaintiffs here, not reasonably being themselves in a position, for want of warning at any time between the supply of the commodity and its use to inspect or purify it, were G entirely dependent upon the supplier of the water to see that it was water which was not in its nature poisonous. That seems to be open as a conclusion of fact on negligence, quite irrespective of the more limited finding that, on the question of the breach of statute, the obligation to supply pure and wholesome water was an obligation satisfied by supplying H water at sufficient pressure at the turncock, without any regard to the fact that it subsequently had to be passed through lead pipes. Here, the water authority knew that the water would pass through lead pipes in part old. They deliberately supplied water which was obtainable by the consumer only after it had passed through lead pipes, so that it would reasonably be expected to become contaminated ; I think that they owed a duty to those persons who were closely and directly affected by their acts, to quote the language of Lord Atkin in *M'Alister* (*or Donoghue*) v. *Stevenson* (3), to take reasonable care to supply them with water which was proper in quality, or at least to warn them that it was not, and that it needed purification.

I would add only this. It has been argued that the whole of their duty is imposed by statute, and that they have no further duty. I cannot accept that argument. There are cases where a duty may be imposed by a statute supervening upon a duty imposed at common law, which makes the common law obligation no longer to obtain. Coke, 2nd Institute, p. 200, says:

> it is a maxim in the common law that a statute made in the affirmative without any negative expressed or implied doth not take away the common law.

Nevertheless, because an authority had been held by the House of Lords to have a limited duty imposed by the Waterworks Clauses Act, 1847, s. 35, and substantially a similar duty, by the Bury and District Joint Water Board Act, 1903, s. 32, to supply at the turncock a sufficient supply of pure and wholesome water for domestic use, it does not mean that their duty at common law necessarily ends when they have satisfied their statutory obligation. Here, as it seems to me, they have, under their powers, offered to supply the consumer with water, pure and wholesome, in conditions that are known to both parties to obtain—namely, to supply it so that it can travel through lead service-pipes, that being a common method agreed upon by both parties for the supply of water, and, indeed, contemplated by the regulations—and they cannot be heard to say that, because the consumer has chosen to have his water supply through a lead pipe rather than through an iron pipe, the fault is his, and not the fault of the water authority. I think that what the water authority offered was to supply pure and wholesome water, whether taken through a lead pipe or whether taken through an iron pipe, and, in so far as such option was held out to the consumer and he was invited to take it though a lead pipe, there was an obligation in that case to supply him with water which, coming through a lead pipe, would not be water which would be poisonous. In my opinion, this appeal should be dismissed.

MacKinnon, L.J.: I agree. I think that the only criticism to be made of the judgment of the commissioner is that by inadvertence he quoted the wrong passage from *Heaven* v. *Pender* (1). He quoted the *dictum* of Brett, M.R., which was expressly dissented from by the other two members of the court, a passage which Brett, M.R., himself practically explained away later in *Le Lievre* v. *Gould* (5). The passage which the commissioner should have quoted from *Heaven* v. *Pender* (1) was that at the end of the judgment of Cotton, L.J., at p. 517:

> . . . anyone . . . who without due warning supplies to others for use . . . [a] thing which to his knowledge . . . is in such a condition as to cause danger, not

> necessarily incident to the use of such . . . [a] thing, is liable for injury caused to others by reason of his negligent act.

Within that principle, I think that the defendants here were liable. They had ample warning of the danger arising from the plumbo-solvency of the water, especially in this Haslingden area. They realised the danger,
A and omitted to take timely measures to prevent it. Some delay in carrying them out was, no doubt, inevitable, and some of it was due, perhaps, to the intervention of the Ministry of Health, but far more it was due to the extreme dilatoriness of the defendants' engineer in not promptly attending to letters and requests sent to him by the Ministry.
B Meanwhile, the defendants, within the exact language of Cotton, L.J., were supplying the plaintiffs, without due warning, with a thing which, to their knowledge, was in such a condition as to cause danger, and from that danger the plaintiffs suffered damage. At one time the defendants were urged to issue a warning to people in the position of the plaintiffs,
C but they decided—I think on the suggestion of the local authority—wisely or unwisely, not to issue such a warning, in case it might cause a panic, an apprehension which I should have thought would have very little foundation.

The only remaining question is whether we are debarred from giving
D effect to the above considerations by reason of the decision of the House of Lords in *Milnes* v. *Huddersfield Corpn.* (2). I do not think that we are. The claim there was based solely on an allegation of breach of statutory duty, under the Waterworks Clauses Act, 1847, s. 35. It was held that the duty was to supply pure water in the mains at a point
E just before it entered the pipes of the particular premises, and that that duty had been fulfilled, and that therefore the claim should fail. All the Lords point out, however, that, in that case, no alternative claim based on negligence was put forward. It is true that the Earl of Selborne does say, at p. 526:

> F Not only was no question of negligence raised, but I think it right to say that I am unable to see how it could possibly have been raised. . . .

I do not think that he is making that observation as expressing his view of the law. I think rather that he is merely saying: "I do not see how any claim for negligence could have been raised on the facts." It is
G apparent, from the report of that case in the court of first instance, before Mathew, J., as he then was, that in 1882 scientific knowledge as to this quality of plumbo-solvency in soft water was nothing like as great as it is now.

I observe from Michael and Wills on Gas and Water, at p. 36,
H that in 1902 a lengthy inquiry on this very problem of plumbo-solvency of water derived from moorland sources was conducted by the Local Government Board, and, as the result of that, in various local Acts for the constitution of water authorities, special provisions have been inserted calling upon such a body to treat the soft water in such a manner as to counteract this danger. Examples of these are the

Matlock Urban District Council Act, 1937, the Chesterfield Act, the Wakefield Act, the Plympton St. Mary Act, the Windermere Act and the Stockport Act. The defendants, as I have said, knew, at the date when this trouble arose, a great deal about this danger from plumbo-solvency in their water, and they were continuing, without any warning
to the plaintiffs, to expose them to the very danger from which they A
suffered damage. In the result, I think that there is ample evidence on which the commissioner was entitled to find, and rightly found, that they were guilty of negligence towards the plaintiffs, and were therefore liable for the damages which the commissioner has assessed.

Appeal dismissed with costs. Leave to appeal to the House of Lords. B

Solicitors: *Lewin, Gregory, Torr, Durnford & Co.*, agents for *Richard Moore*, Solicitor and Clerk to the Irwell Valley Water Board (for the appellants); *A. J. Hunter & Co.*, agents for *Barlow, Rowland & Co.*, Accrington (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*] C

R. *v.* KING.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Branson and D
Humphreys, JJ.), **May 3, 1938.**]

Criminal Law—Larceny—Receiving property known to be stolen—Property returned to possession of owner or police—What amounts to return of property—Parcel handed to police but not opened.

The appellant was convicted, together with a man named Burns,
of receiving stolen goods knowing them to have been stolen. A fur coat E
had been stolen, and shortly afterwards the police went to a flat where they found the man Burns, and told him they were inquiring about some stolen property. He at first denied that there was anything there, but finally admitted the theft, and produced a parcel from a wardrobe. While a policeman was in the act of examining the contents of the parcel, the telephone bell rang. Burns answered it, and the police
heard him say "Come along as arranged." The police then suspended F
operations, and about 20 minutes later the appellant arrived, and, being admitted by Burns, said "I have come for the coat. Harry sent me." This was heard by the police, who were in hiding at the time. The coat was handed to the appellant by Burns, so that he was actually in possession of it. It was contended that the possession by the police amounted
to possession by the owner of the coat, and that, therefore, the coat G
was not stolen property at the time the appellant received it:—

HELD: the coat had not been in the possession of the police, and it was therefore still stolen property when the appellant received it.

[EDITORIAL NOTE. If stolen property is passed into the possession of the prosecutors or their representatives before it is received by the receiver, the latter
is not guilty of receiving. Here the question is whether there is sufficient evidence H
of the property being in the possession of the police officer.

AS TO WHAT IS RECEIVING, see HALSBURY, Hailsham Edn., Vol. 9, pp. 553, 554, para. 940; and FOR CASES, see DIGEST, Vol. 15, p. 962, Nos. 10748-10751.]

Cases referred to:

(1) *R.* v. *Dolan* (1855), Dears. C.C. 436; 15 Digest 962, *10,748*; 24 L.J.M.C. 59; 24 L.T.O.S. 279.

(2) *R.* v. *Schmidt* (1866), L.R. 1 C.C.R. 15; 15 Digest 962, *10,749*; 35 L.J.M.C. 94; 13 L.T. 679.

(3) *R.* v. *Hancock & Baker* (1878), 38 L.T. 787; 15 Digest 962, *10,750*.

(4) *R.* v. *Villensky*, [1892] 2 Q.B. 597; 15 Digest 962, *10,751*; 61 L.J.M.C. 218.

APPEAL by leave against a conviction at the London Sessions for receiving stolen goods knowing them to have been stolen. The facts and arguments are fully set out in the judgment.

Edward Clarke for the appellant.

G. G. Raphael for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: In this case, the appellant Charles King was convicted, together with a man named Jack Burns, at the London Sessions, of receiving stolen goods knowing them to have been stolen, and he was sentenced to 12 months' imprisonment with hard labour. According to his notice of appeal, he appeals against conviction, and, in assuming that the conviction is a proper one, the court thinks that Mr. Clarke has exercised the wisest discretion in not appealing against sentence.

With regard to the appeal against conviction, Mr. Clarke has put the facts before us, and they can be shortly stated. A fur coat was stolen from a house in Bruton Place, London, and on Feb. 2, which was shortly afterwards, the police went to a flat in Albany Street, where they found the man Burns. The police told him that they were making inquiries about some stolen property, and Burns said that there was nothing there. A little later, realising that the police were going to search his premises, Burns admitted the theft, and produced from a wardrobe a fur coat, which was done up in a parcel. Then, according to the evidence of a policeman—which, it must be assumed, the jury accepted—when he was in the act of examining the contents of the parcel, the telephone bell rang, and there was a conversation. This conversation was given in evidence, and obviously could properly be given in evidence, because Burns was one of the persons on the telephone, and the conversation was this, so far as the police heard it:

> Yes . . . No . . . Come along as arranged.

The police then suspended their operations so that the person might come along as arranged, and, at the end of twenty minutes, there came along, whether arranged or not, the appellant King. He came to the flat, knocked at the door, and, having been admitted by Burns, said: "I have come for the coat. Harry sent me." That was heard by the police officers, who were in fact hiding behind the doors. The coat was handed to the appellant by Burns, and he had it in his possession, which enabled it to be said that he was sufficiently in possession of the coat. On that evidence, Mr. Clarke has said that King could not be convicted of receiving that coat, whether it was stolen or not, because it was not stolen at the time when he received it and the facts are within the line of cases where it has been held that, if the owner had come into possession of the goods before they had come into possession of another person, it was no longer stolen property.

As to the correctness of that law, there is no dispute at all. In addition to the cases quoted to us by Mr. Clarke—*R.* v. *Dolan* (1), *R.* v. *Schmidt* (2), *R.* v. *Hancock & Baker* (3)—there is a later case, *R.* v. *Villensky* (4), in 1892, tried before the Court of Crown Cases Reserved, the predecessor of this court, the Court of Criminal Appeal, following *R.* v. *Dolan* (1). In *R.* v. *Villensky* (4), it was said in the headnote:

> that as the person in whom the property was laid had resumed possession of the stolen property before its receipt by the prisoners, it had then ceased to be stolen property, and the prisoners could not be convicted of receiving it knowing it to have been stolen.

That is the law as upheld by this court.

The difficulty which appears in the way of Mr. Clarke's argument is that the facts in this case fail to show that the stolen property had been reduced into the possession of the owner—which, of course, it had not been—or into the possession of the police, at the time when it was received by the appellant Charles King. There is no doubt that in a very few moments it would have been reduced into the possession of the police, which would have been sufficient for the purpose of the legal argument that it was no longer stolen property. On the facts of this case, however, there was ample evidence (if there was any receipt at all by King, though it was not admitted by him) that, at the time of the final possession of the coat it had not been in the possession of the police officer, and that it was stolen property.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

Dictum of Slesser, L.J., at p. 675, *explained.* Fredk. Berry, Ltd. *v.* Royal Bank of Scotland. [1949] 1 All E.R. 706.

ed *by* Reginald Townsend, Esq., *Barrister-at-Law.*]

LAMBERT AND ANOTHER *v.* F. W. WOOLWORTH & CO., LTD. (No. 2).

[Court of Appeal (Greer, Slesser and MacKinnon, L.JJ.), **April 26, 27, 28, May 11, 1938.]**

Landlord and Tenant—Improvements—Unreasonable withholding of licence—Compensation substantial but uncertain in amount—Right of landlord to consider self-interest—Covenant against making alterations—Landlord and Tenant Act, 1927 (*c.* 36), *s.* 19 (2).

The plaintiffs were the lessors and the defendant company the lessee of certain shop property. The defendant company desired to convert this property, together with other property of which it had secured a lease, into a composite shop. The proposed alterations included pulling down the back wall of the shop on the demised premises, moving the main staircase, and making other material alterations. In previous proceedings, the Court of Appeal had by a majority expressed the view that what was intended to be done was an improvement within the

Landlord and Tenant Act, 1927, but dismissed the appeal upon other grounds. The defendant company, after the conclusion of the appeal, wrote to the plaintiffs stating that it was desirous of executing the works, and offering an undertaking to reinstate the premises upon the determination of the lease, an undertaking to pay all costs and expenses and to provide security for the performance of the undertaking to reinstate. The plaintiffs withheld their consent to the execution of the works upon these terms, and refused to go to arbitration upon the question of the amount of the compensation or to place that question before any tribunal. The plaintiffs then brought this action, claiming a declaration that the proposed works were breaches of certain covenants in the lease and that the licence to perform such works had not been unreasonably withheld within the Landlord and Tenant Act, 1927, s. 19 (2). The defendant company counterclaimed for a declaration that the proposed works were improvements within the Act :—

HELD (GREER, L.J., dissenting) : (i) the question of whether or not an alteration is an improvement must be considered from the point of view of the tenant.

(ii) the alterations here proposed were improvements.

(iii) the landlord's consent in this case had been unreasonably withheld.

(iv) (*per* SLESSER, L.J.) : the question of improvement must be limited to an improvement of the demised property.

(v) (*per* SLESSER, L.J.) : the onus of proving that the withholding by a landlord of his consent is unreasonable is upon the tenant. If, however, the landlord merely refuses, but gives no reason for so doing, the onus is upon him to show that his action was reasonable.

Decision of SIMONDS, J. ([1937] 3 All E.R. 195), *varied.*

[EDITORIAL NOTE. The court have now decided by a majority that the alterations here proposed to be made are improvements and that the landlord unreasonably withheld his consent. The question of improvements had been so widely discussed in the previous proceedings that there was little more to be said upon this part of the case. The principal result of the present appeal is, therefore, that the landlord cannot, in the ordinary way, just refuse his consent. He must state his reasons for refusing. If he does not do so, the onus is upon him to show that his refusal is reasonable.

AS TO IMPROVEMENTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 212, 213, para. 231 ; and FOR CASES, see DIGEST Supp., Landlord and Tenant, Nos. 2995a, 2995b.]

Cases referred to :

(1) *F. W. Woolworth & Co., Ltd.* v. *Lambert,* [1937] Ch. 37 ; [1936] 2 All E.R. 1523 ; Digest Supp. ; 155 L.T. 236.

(2) *Balls Bros., Ltd.* v. *Sinclair,* [1931] 2 Ch. 325 ; Digest Supp. ; 100 L.J. Ch. 377 ; 146 L.T. 300.

(3) *Lilley & Skinner, Ltd.* v. *Crump* (1929), 73 Sol. Jo. 366 ; Digest Supp.

(4) *Re Gibbs & Houlder Brothers & Co., Ltd.'s, Lease, Houlder Brothers & Co., Ltd.* v. *Gibbs,* [1925] Ch. 575 ; 31 Digest 383, *5286* ; 94 L.J. Ch. 312 ; 133 L.T. 322.

(5) *Young* v. *Ashley Gardens Properties, Ltd.,* [1903] 2 Ch. 112 ; 31 Digest 387, *5329* ; 72 L.J. Ch. 520 ; 88 L.T. 541.

(6) *Treloar* v. *Bigge* (1874), L.R. 9 Exch. 151 ; 31 Digest 379, *5259* ; 43 L.J. Ex. 95.

(7) *Whitley* v. *Stumbles,* [1930] A.C. 544 ; Digest Supp. ; 99 L.J.K.B. 518 ; 143 L.T. 441 ; *affg.,* [1930] 1 K.B. 393.

(8) *Mills* v. *Cannon Brewery Co.,* [1920] 2 Ch. 38 ; 31 Digest 382, *5275* ; 89 L.J. Ch. 354 ; 123 L.T. 324.

APPEAL from a decision of SIMONDS, J., dated June 7, 1937, and reported [1937] 3 All E.R. 195, 334.

The facts of the case are set out in the earlier proceedings reported in [1936] 1 All E.R. 333, and [1936] 2 All E.R. 1523.

Cyril Radcliffe, K.C., and *Roger W. Turnbull* for the appellants.

Hon. Sir Stafford Cripps, K.C., *F. R. Evershed, K.C.*, and *S. P. J. Merlin* for the respondents.

Radcliffe, K.C.: An improvement must be a benefit to the property, not merely something that suits the tenant. An alteration may be an improvement even if it diminishes the value of the premises from the landlord's point of view. [Counsel referred to *Lilley & Skinner, Ltd.* v. *Crump* (3) and *Balls Bros., Ltd.* v. *Sinclair* (2).] The first action between these parties left it undecided whether or not these proposed alterations were improvements. The landlord might have refused to give his consent, because the alterations were not improvements. That would be risky, in view of the earlier decision of the Court of Appeal in this case. He might have asked for a sum of money and then been in danger of getting nothing if he had asked for too large a sum. Thirdly, he might have gone to arbitration. He would thereby abandon his legal objections. [Counsel referred to *Treloar* v. *Bigge* (6).] This court can consider afresh the question of what constitutes an improvement. The majority of the Court of Appeal in the earlier case thought that the test was whether the tenant was enabled to carry on his business better. That test is unwarrantable. This part of the Act does not apply only to business premises.

Cripps, K.C.: An improvement does not mean something that enhances the value of the premises. It implies, firstly, an alteration, and, secondly, an alteration for the better. The question is; who is to be the judge of whether it is for the better? The alteration may be one which diminishes the value of the premises, and even one which damages them. It may also diminish the letting value, and therefore the value of the reversion. There are only two parties here, the landlord and the tenant, and it is clear that sect. 19 (2) eliminates the landlord. Therefore the tenant is to be the judge. The only criterion is the tenant's interest. That was the view of the Court of Appeal. It is for the landlord to require payment of compensation, not for the tenant to offer it. The landlord must demand a reasonable sum, and it is for him to show that it is reasonable. One must look at the section itself to see what is meant by unreasonable. There is some guidance because the section says what is reasonable. If it were only the landlord's interest that had to be considered, the section would be wholly unnecessary, because he could always refuse to give his consent. Therefore it must be the tenant's interest. [Counsel referred to *Whitley* v. *Stumbles* (7), *Houlder Bros. & Co., Ltd.* v. *Gibbs* (4), and *Mills* v. *Cannon Brewery Co.* (8). When these alterations were first suggested, the landlord was prepared to consent, subject to the payment of a sum of money. Therefore it cannot now be reasonable to give an unconditional refusal.

Evershed, K.C.: The true definition of improvement is a turning to account by the tenant of the demised premises. It may be that that can best be done by using them in association with some other premises. It may be that a landlord is not bound to state a reason for refusing his consent, though, if he does, then it must be a reasonable one: *Young* v. *Ashley Gardens Properties, Ltd.*, (5).

Radcliffe, K.C., in reply: A landlord must act, not capriciously, but prudently. In this case, he was entitled to refuse. The whole matter was so uncertain. The refusal was not unconditional. The state of the law was uncertain, and, until that was known, he did not want to state any conditions. Improvements must be of the demised premises. These were not improvements to them, but to a combined site of the demised premises and the next-door ones.

GREER, L.J.: The appellants in this case brought an earlier action against the respondents asking for certain declarations. The case came on for hearing before CLAUSON, J. (now CLAUSON, L.J.) who decided, first, that the material placed before him did not enable him to say that the appellants, the plaintiffs in the action, had discharged the onus that lay upon them of proving that the defendants had unreasonably refused to grant a licence to the plaintiffs to make certain alterations in the premises which had been demised to them. The judge also held that the alterations which the plaintiffs proposed to make in the demised premises were not improvements within the meaning of the Landlord and Tenant Act, 1927, s. 19 (2).

There was an appeal from this decision which was heard by LORD WRIGHT (then Master of the Rolls), ROMER, L.J. (now LORD ROMER), and GREENE, L.J., now SIR WILFRID GREENE, M.R. All the members of the court agreed in holding that the onus was on the respondents to prove that the consent of the landlords had been unreasonably refused. There was no appeal from that decision to the House of Lords, and both parties in the present appeal are bound by the decision in the previous action, though they may be entitled to question it by appeal to the House of Lords. It is in any event binding on us, and, in so far as the relevant facts are the same in the present appeal, we must hold ourselves bound by their decision. The members of the court were pressed to express an opinion upon the other branches of the case which had been fully argued, and, though their views thereon were clearly not any part of the *ratio decidendi* of the court, they did in fact express their opinions on these other questions, especially upon the question whether the alterations proposed by the defendants were improvements within the meaning of sect. 19 (2) of the statute.

If CLAUSON, L.J., was right in his view that the proposed alterations were not improvements within the meaning of the section, no other question can arise for decision. I think that it is clear that the Court of Appeal did not intend that their decision on this question as to the meaning of improvements should be part of the *ratio decidendi* of the case that was before them, but that their views upon this question should be merely *obiter*, given at the request of the parties in order to assist them in coming to a conclusion as to whether it was worth while to bring another action, but leaving it to either party to bring another action to have the point finally decided. The appellants then brought the present action. It is unnecessary for me to state in detail the facts so far as they relate to the vital question as to whether the respondents' proposals were improvements within the meaning of the section, as the facts are fully set out in the judgments of the Court of Appeal in the previous case.

The present action was brought by the appellant landlords in order to obtain a declaration, *inter alia,* that the proposed alterations were not improvements either from the point of view of the defendants or from that of the landlords. The present action came on before Simonds, J., who came to the conclusion that he ought to follow the opinions expressed by the majority of the Court of Appeal—that is to say, by Lord Wright, M.R., and by Lord Romer—in the previous appeal.

So far as this question is concerned, the relevant facts in the present action are similar to those proved in the first action. They are fully stated by all three Lords Justices in the previous appeal, and I need not repeat them. I find myself in agreement with the views expressed by Clauson, J., and Greene, L.J., on the question whether the suggested alterations were improvements within the meaning of sect. 19 (2) of the statute mentioned. I find it necessary to add but little to those reasons, which in substance represent the conclusions at which I have myself arrived. I think that sect. 19 (2) must be read as meaning that the undertaking of the defendants was not to make any structural alterations in the demised premises, in so far as they constituted improvements, without the consent of the landlords, and that, if the proposed alterations were not improvements, then the section does not provide that there should be implied by law any qualification of the tenants' undertaking not to make structural alterations in the demised premises.

The covenant into which it is argued the qualifications stated in sect. 19 (2) should be inserted is a covenant in reference to an alteration to the demised premises, and the words as to whether the proposed alterations are improvements must necessarily mean, "Can they be said to be improvements in the demised premises ?" I think that the fact that they make the business and the user of the tenants in the demised premises, together with the increased accommodation that they obtained from other landlords, better, has nothing to do with the question as to whether the proposed alterations were improvements of the demised premises. I entirely agree with the view expressed by Greene, L.J., on this subject, though I think that it was unnecessary for him to admit, as he appears to have done, that the making of a doorway or other opening between the two different premises could be regarded as an improvement of the demised premises. I am inclined to think that, if the doorway was merely a doorway to enable an additional exit from the demised premises, it might be considered an improvement, but that, if it was an opening made in order to join two premises held from different landlords, it could not be regarded as an improvement. Apart from this, I agree entirely with the reasoning of his judgment, and think it necessary to add very little to it.

I desire especially to point out (i) that the covenant to reinstate the premises applies only to their reinstatement at the end of the lease—that is to say, at a date in 1973 ; (ii) that in the meantime it would be impossible for the lessees either to sublet the demised premises as they are or to sublet by itself the portion they had erected on Commander Munro's property ; (iii) that they could exercise their powers of subletting only by subletting the whole of the property comprised in the two leases with the reasonable consent of their two landlords ; (iv) that it seems to me quite impossible to say that it was an improvement to the tenants' interests in the demised premises so to alter them as to make it impossible for them to use each of the floors for the benefit of their business by reason of the removal of the staircase, or that they could have secured any sublessee to take the demised premises unless he was willing, and they were able, to give him a sublease of both the appellants' building and the adjoining building, which is on Commander Munro's land.

For these reasons, if the result of the appeal depended on my view, I should be prepared to grant the declaration which the appellants ask for, allow the appeal, and dismiss the cross-appeal, with the usual consequences.

Slesser, L.J. : The facts of this case have been so often stated during the protracted litigation which has taken place between the parties that I do not think it necessary to repeat them again in any detail.

On the present appeal, two questions arise—namely, whether or not the works desired to be carried out by the tenants are improvements to the demised premises within the meaning of the Landlord and Tenant Act, 1927, s. 19 (2), and whether or not, if they be improvements, the withholding by the landlords of their licence or consent to the execution by the tenants of the works was an unreasonable withholding within the meaning of the same subsection.

The judge in this case held that the works in question were improvements as above described, but further held that the plaintiffs had not acted unreasonably in withholding their licence and consent to the execution of the alterations. Both parties appeal, the plaintiffs contending that the works are not improvements, and that therefore the material section of the 1927 Act does not apply, and the defendants by cross-appeal asking this court to declare that the plaintiffs have unreasonably withheld their licence or consent.

The section in question in its opening words speaks of leases containing a covenant against the making of improvements without licence or consent, and to such leases only do its provisions apply. The instrument here to be considered does not in terms contain any covenant against the making of improvements without licence or consent, but does contain a covenant by the lessees that they will not, without a previous consent in writing of the lessors, erect or suffer to be erected any other building upon the said demised premises, or make or suffer to be made any structural alterations in or additions to the demised premises. There follow provisions as to alterations agreed before the lease, on which no question arises. Then there follows a proviso :

> that in the event of the lessee company making with the consent and approval of the lessors any further additions alterations improvements to or extensions of the demised premises at any time during the said term no fine or premium or increase of rent will be demanded for such consent and approval.

This court has already held that the subsection refers to any covenant against alterations without licence or consent, and that, if there is a clause, in whatever terms, and if the proposed alterations are in fact capable of being deemed to be improvements, then the clause would apply : *per* LORD WRIGHT, M.R., in *F. W. Woolworth & Co., Ltd.* v. *Lambert* (1), at p. 49. Thus, although the case contains no direct reference to consent or to a licence for improvements, the question here arises whether the proposed alterations are in fact capable of being deemed to be improvements. In this court, in the case to which I have just referred, the majority were of opinion that they were so capable, but GREENE, L.J., was of the contrary opinion. In my view, when that case is carefully considered, although the opinions of the court, of course, are of the greatest weight in determining the problem, the views on the question whether these works were improvements as expressed in that case were expressed *obiter*, and were not part of the reasons for their decision, which was in favour of the defendants, solely upon the ground that the plaintiffs had failed to prove that the defendants had unreasonably withheld their consent to the proposed alterations. LORD WRIGHT, M.R., as appears from the transcript, on application for leave to appeal to the House of Lords in that case, said :

> The question of principle [on the point of what constitutes improvements] which has been discussed really has only been discussed by way of observation. It may be that some other case will involve an appeal to the House of Lords.

ROMER, L.J., said, at p. 60 :

> . . . it is sufficient to dispose of this case by saying, as CLAUSON, J., said, that the plaintiffs have not discharged the onus that lay upon them of showing that the defendants had unreasonably withheld their consent.

GREENE, L.J., speaks of the matter as one that had been discussed in the case, and LORD WRIGHT, M.R., says, at p. 42, that the plaintiffs had failed to show that the licence had been unreasonably refused, and that the appeal should be dismissed.

The matter is therefore open to us for our consideration, paying due regard, as I have said, to the observations of this court in disapproving, by a majority, of the views of Clauson, J. ([1936] Ch., at p. 415), from whom that appeal was brought, that the proposed alterations, though they might benefit the plaintiffs, were not improvements of the demised premises, and also of the observations of Greene, L.J., to the contrary effect.

Although the 1927 Act contains no definition of the word " improvements " used in sect. 19 (2), yet that subsection, if read as a whole, gives some indication of the meaning there to be ascribed to the word, for, having enacted that, in all leases containing a covenant against the making of improvements without licence or consent, such covenant shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld, the subsection goes on to say that this proviso shall not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to, or diminution in the value of, the premises, or any neighbouring premises belonging to the landlord, nor, in the case of an improvement which does not add to the letting value of the building, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises. From these words it follows that the section contemplates that an alteration may be an improvement although it produces damage or diminution in the value of the premises, or does not add to the letting value of the holding, so that the mere fact of damage or diminution in the value arising to the premises from their alteration will not of itself necessarily prevent the alteration from being an improvement. In other words (as the court has by a majority, I think, already decided), the question whether or not the alteration is an improvement must be regarded from the point of view of the tenant. This was the view taken by Luxmoore, J., in *Balls Bros., Ltd.* v. *Sinclair* (2), following a decision of Rowlatt, J., in *Lilley & Skinner, Ltd.* v. *Crump* (3). It is a view which, as I read their judgments, found favour with the majority of this court on the last appeal, but, if it be open to us to consider the matter, as I think it is, I would say that I also have come to the conclusion that the question of improvement must be regarded from the point of view of the tenant. I also accept the view that it must be limited to an improvement of the demised property, for that, and that only, is the subject-matter of the whole subsection which is dealing with the making of improvements of the demised premises.

Whether a proposed alteration of the demised premises is such an alteration as to destroy the subject-matter demised is one question. Whether, when the alteration is one which can be made without destroying the subject-matter, it is to be taken as an improvement is another. Thus, on the one hand, where what is demised is merely described as land, though there be buildings upon it, it may well be that, under a licence to alter buildings, a complete reconstruction might be permissible, although it would have the result of destroying altogether the original building; where, on the other hand, the demised premises are described with great particularity—as might be the case, for example, in the case of a building with a defined number of floors—the removal of one floor altogether might be outside the scope of the powers given to alter the premises, in that what would be done would not be an A alteration, but a destruction, of the subject-matter. In this present case, however, on the facts, I do not think that there can be any question but that the alterations here proposed are within the powers given under the lease. The premises are required to be used, occupied and preserved as a first-class shop or shops, and there is power, with the previous B consent in writing of the landlords, as I have already stated, to erect, or suffer to be erected, other buildings upon the demised premises, and to make or suffer structural alterations in, or additions to, the demised premises. What is here proposed by way of reconstruction would in no wise prevent that part of the combined new premises which is on the C land the subject of the demise from continuing to be a first-class shop, and all that is done in fact is to extend its area, partly over land the subject-matter of the demise and partly over adjacent land not so demised.

I need not recite the very drastic alterations which are proposed, D involving, as they do, the total removal of one of the walls of the existing shop, itself a combination of two earlier buildings, and other alterations, such as the removal of the main staircase and lavatory accommodation in the existing shop, and the considerable alteration of the drainage system. For myself, I share the inability expressed by Romer, L.J., in E the former appeal to understand why, if a communicating door between the demised premises and other premises outside the area of the demise can be made and regarded as an improvement, as I think it can, the removal of a whole wall cannot similarly be so regarded, if it adds to the total floor space. Nor does it seem to me to make any difference on F this head, where such removal is sought to be made in order to increase business amenity, whether a wall is removed to give access to premises to be built upon another part of the demised land or to premises on another's land which is adjacent, or to give open access to a highway. In all these cases, as Lord Wright, M.R., points out, at p. 50, the shop G might cease to be a self-contained shop, but so also would it be if archways or other communications other than the space produced by the removal of a whole wall were contemplated. In other words, paying particular regard to the fact that the subsection contemplates in certain cases reinstatement, I see no reason why the whole wall should not be reinstated H as readily as a more limited aperture might. Greene, L.J., the present Master of the Rolls, whose judgment I have very anxiously considered, says that the matter is one of fact and degree in each case. The test he suggests, at p. 64, is that the improvement must be an improvement to the premises which are the subject-matter of the covenant, and not merely an improvement which derives its character as such from its effect and result upon some composite building. He goes on to say that it may well be an improvement to make an opening from the demised premises into other premises, for the reason that the existence of that opening and the existence of that communication is a thing which improves the subject-matter of the covenant—namely, the demised premises—and does not derive its beneficial result merely from the fact that the tenant is the owner of some composite premises. He then goes on to point out that the removal of the wall cannot be called such an improvement, but says that it is desirable, and desirable only by reason of its effect upon the composite premises. With respect, I am unable to agree. The making of an opening, as of a door, in the demised premises, apart from a consideration of the adjacent land, seems to me to be no more and no less an improvement than is the removal of the wall. If it is objectionable to consider the effect upon the combined premises in considering the case of the wall, so also is it in the case of a door. A wall may be a detriment, its removal an improvement—" O wall," as Thisbe laments, " full often hast thou heard my moans, For parting my fair Pyramus and me ! " In each case, the matter must be regarded, I agree, from the point of view of the demised premises as such. It is from that point of view that the tenants here contend that the user of the present shop, the demised premises, will be improved by access to a wider area. Whether that wider area include contiguous premises or be an arcade or give better access to a highway seems to me immaterial.

I follow, therefore, the views expressed by the majority of this court in the recent appeal in this case, and am of opinion that the alteration here required can properly be said to be an improvement, and think, therefore, that this lease, containing a covenant against the making of alterations as constitute such improvements without licence or consent, must have imposed upon it the proviso and consequential conditions mentioned in sect. 19 (2). I am of opinion that the judge was right when he decided that these proposed alterations were improvements, and that consequently his declaration to that effect should not be disturbed, and that the appeal fails.

The cross-appeal raises questions of difficulty. The facts in this matter are different from those in the first appeal. On that occasion, the landlords demanded £7,000, in addition to the tenants' undertaking to reinstate, as a condition of giving their licence. The plaintiffs took the view that, in return for a licence to carry out the work, they should pay the lessors no more than a reasonable sum in respect of any damage to, or diminution in the value of, the premises, if any, such sum to be ascertained by the court if not agreed. On May 13, 1935, the defendants thereupon refused their consent to the making of the improvements, except on the footing of the payment by the plaintiffs to the defendants of the sum of £7,000.

In the present case, the facts are that on Jan. 4, 1937, after the decision in the Court of Appeal, the tenants again applied for a licence from the landlord to make alterations, which were, with slight modifications, those which had been proposed before, and added :

> Our clients are prepared as a condition of such licence to execute a deed containing : (i) an undertaking to reinstate the said premises in the condition in which they were before the proposed alterations were executed ; (ii) a provision for satisfactory security for the performance of the said undertaking ; (iii) an undertaking to pay all your clients' legal and other expenses properly incurred in connection with such licence.

It will be observed that, on this occasion, the tenants did not offer in addition, as they did formerly, to pay the landlords a reasonable sum in respect of any damage to, or diminution in the value of, the premises, any such sum to be ascertained by the court if not agreed. On Jan. 22, 1937, the solicitors for the landlords asked the solicitors for the tenants whether the tenants were claiming that the alterations were improvements within the meaning of the Landlord and Tenant Act, 1927, s. 19 (2), and received a reply in the affirmative. Thereupon the landlords refused their consent. On this occasion, they did not put forward any kind of proposal for the payment of a particular sum by way of compensation, nor did they make any other proposal for the assessment of compensation by any tribunal. SIMONDS, J., has held that the course which they took was to withhold consent, for that is what, in his judgment, their action amounted to, although they put it in the form of postponing their decision until the question which they wished to have adjudicated upon should be determined, if necessary, by the highest tribunal, whether these proposed alterations were in fact improvements within the statute. I agree with his view of the effect of the landlords' action.

On this, the question now arises whether or not such licence or consent was unreasonably withheld. This is a case to be regarded, in my view, as one of unqualified refusal. It is not a case where the landlords have sought to exercise their right, as stated in the statute, to require, as a condition of such licence or consent, the payment of a reasonable sum in respect of any damage or diminution in the value of the premises. Such a right might have been exercised either by asking for a particular sum or by saying that they would give their consent on the agreement by the tenants to pay what a tribunal might decide to be reasonable, following in this matter the same course as is expressly indicated in sect. 19 (3), in dealing with covenants against the alteration of the user of demised premises without consent. Why the provision in that subsection to the effect, that " where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable," has not been adapted with suitable amendment to the different subject-matter in subsect. (2), I do not know. In any event, I cannot share the view that the landlords would have been in any peril if they had made some such condition of granting their consent as the tenants had themselves suggested on the first application, when the landlords were demanding £7,000. However this may be, in the present case, as I have said, the landlords have unconditionally withheld their consent, and made no condition as to payment of any compensation in respect of damage to, or diminution in the value of, the premises. Having so failed, they have abstained A from claiming the benefit of subsect. (2), which expressly preserves this right to them, nor, in my view, can they now be heard to say, as evidence of reasonableness, that the premises have suffered damage, or any diminution in value, and that the tenants have not offered to compensate them. *Prima facie*, the proviso says that they shall not un- B reasonably withhold their licence or consent, but gives to them expressly a right to claim the payment of a reasonable sum in respect of damage or diminution in value. This they have not claimed, and I think that therefore they must seek for some grounds of reasonableness for their refusal other than those of damage or diminution in value, to meet the C case of the tenants against them.

I accept the view, which I think was unanimously expressed in this court on the last appeal, that the onus of proving that the withholding is unreasonable is on the tenant, but, if the landlord gives no reason, but merely refuses, that in itself, I think, puts upon him the duty of D showing that his action was reasonable. The Act contemplates that the landlord may not in every case merely refuse to grant his licence without more, for the proviso which it imports into the lease does, I think, contemplate that he shall not act arbitrarily. In the case of covenants not to assign, it has been held that grounds of objection E unconnected with the person of the assignee or the user or occupation of the premises are not reasonable : *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease* (4). *A fortiori* the refusal is unreasonable if no grounds are given at all and none can be shown. In this case, there is nothing to support a finding of absence of unreasonableness on which the land- F lords can rely. I agree with Mr. Radcliffe that many considerations, æsthetic, historic or even personal, may be relied upon as yielding reasonable grounds for refusing consent, which I do not think it necessary or possible here to catalogue. The wider the connotation given to the idea of improvement, the more necessary it may be that the landlord G should have his protection. In the present general decline of taste and manners, a shop-keeper, looking at the matter from a purely commercial point of view, may be right in saying that the removal of some beautiful casement and the substitution of a garish window or façade of false marble may prove an attraction to the public, and so, from his point of H view, be an improvement. It is most important that the landlord should be able to be heard to say that it may be reasonable that he should withhold his consent to the perpetration of contemplated atrocities. In the present case, as the photographs show, no such considerations could possibly be urged. The erection of a kind of Assyrian façade, appropriate to, and possibly copied from, an archaic heathen temple, may or may not be in accordance with the spirit of the age. It is impossible to say that, architecturally, it can be regarded as any worse than the sordid front of late-Victorian architecture for which it was substituted. In any case, Mr. Radcliffe makes no æsthetic appeal upon this head, nor does he suggest that any ancestral or other personal considerations arise. In any event, the present frontage to the street had been agreed upon when Woolworths made their first alteration to the present premises, and it is only the extension at the back, on to a confused area of garages, yards and sheds, which is affected. In this case, the only possible reason which the landlords might have for refusing consent is in relation to the damage or diminution to the value of the reversion of their premises. For this, the section provides a right of claim of which they have not thought fit to avail themselves. In the result, I have come to the conclusion that the tenants have discharged the onus upon them of proving that the consent in this case has been unreasonably withheld, and that consequently the cross-appeal should be allowed, and a declaration made to that effect.

MacKinnon, L.J.: The dispute between these parties has already been before another division of this court, when it unfortunately gave rise to a difference of opinion. Its reappearance before us is avowedly only a stage on the journey to the House of Lords. It is unnecessary for me to recount the facts.

The Landlord and Tenant Act, 1927, is described in its title as having two objects. The second of them is alone material in this case—namely, "to amend the law of landlord and tenant." Sect. 19 (2) enacts that any covenant in a lease against the making of improvements without the landlord's consent shall be deemed to be subject to a proviso that such consent is not to be unreasonably withheld.

It was long ago said by the great Coke that, where a statute is passed to amend the common law, it is the duty of a judge to see what the mischief was for which the common law did not provide, and on what remedy for that mischief Parliament has resolved. Knowing these two things, the office of the judge is to make such construction of the statute as shall suppress the mischief and advance the remedy, and defeat subtle inventions and evasions for the continuance of the mischief.

The mischief aimed at by this sect. 19 (2) is obviously the power of the landlord to exact arbitrary payment—not to use a harsher word—from a tenant as the price of his consent. The remedy is the enforced addition to the covenant that consent is not to be unreasonably withheld.

If the section were read very strictly, it would add the proviso only to a covenant that the lessee shall not make "improvements" without the lessor's consent. No one, however, has ever seen a covenant in such terms. Clearly it must refer to the common type of covenant not to make alterations in or additions to the demised premises. The section, however, contemplates alterations or additions that are "improvements."

I think that this means alterations or additions which are regarded by the tenant as improvements, and are desired as such by him, and that it is not necessary that they should be improvements from the point of view of even the most altruistic landlord. This seems a necessary inference from the fact that the section contemplates that the " improve-
A ment " may cause damage to, or diminution in the value of, the premises, and provides for compensation to the landlord for such damage or diminution. I think that LUXMOORE, J., was right when, in *Balls Bros., Ltd.* v. *Sinclair* (2), another case about this section, he said at p. 331 :

> The question whether it is an improvement or not may be considered from the
> B point of view of the tenant alone.

The lease of Feb. 27, 1931, has among the lessees' covenants cl. 2 (v), which provides :

> Not without the previous consent of the lessors . . . to make or suffer to be made any structural alterations in or additions to the demised premises, etc.

C

This is clearly within sect. 19 (2) of the Act " a covenant against the making of improvements without licence or consent." The Act, therefore, requires that in the lease a proviso that such consent is not to be unreasonably withheld must be deemed to be added to the covenant.

D In so far as the alterations desired by the lessees, which are therefore " improvements," are only alterations inside the demised premises—that is to say, the removal of the stairs that give access to the back part of the shop—the only question would be whether the plaintiffs have unreasonably withheld their consent to that alteration. A further
E question arises, however, from the fact that the defendants desire to pull down the back wall of the demised premises, so as to unite them with the new building they propose to erect on the land behind, which they have leased from Commander Munro. It is said that, as these " improvements " are not confined to alterations of the demised premises,
F the part of them that affects the demised premises cannot be regarded as improvements of those premises. This was the point on which, in the previous action, there was a difference of opinion between LORD WRIGHT, M.R., and ROMER, L.J., on the one side, and GREENE, L.J., on the other.

G I agree with the view of LORD WRIGHT, M.R., and ROMER, L.J. If the tenant of demised premises has bought or leased adjacent land, and desires to get access to that land by making a doorway or opening through the wall of the demised premises, I think that he can clearly assert that such an opening, even if it be *pro tanto* a destruction of part of the
H demised premises, is an alteration which is to be regarded as an " improvement " under the section of the Act. If that be so, what is here proposed is an alteration of the same kind, though it differs very much in degree. If an alteration of a certain kind can be an " improvement," however, I do not think that it ceases to be so if it happens to be a very big alteration of that kind. In the result, I think that the works which

the defendants propose to carry out are improvements within the meaning of the section, that they are alterations within the covenant in the lease, and that, by reason of the Act, the words, "such consent not to be unreasonably withheld," have to be taken as added to the covenant.

The defendants, by their solicitors' letter of Jan. 4, 1937, gave to the plaintiffs full particulars of the alterations which they desired to make, and asked for the licence of the plaintiffs to make them. The plaintiffs have failed to give such licence or consent. The only question that remains is whether such consent has been unreasonably withheld.

Leaving aside the statute for the moment, if there is a covenant in a lease "not to make structural alterations without consent, such consent not to be unreasonably withheld," and if the tenant asks for consent to do certain works, the landlord might justify his refusal to consent on various grounds. (i) He might object on æsthetic, artistic, or sentimental grounds. (ii) He might object that the alterations would damage the demised premises, or diminish their value. (iii) He might, perhaps, object that the alteration would damage his neighbouring premises, or diminish their value. I say "perhaps," as to this, having in mind the possible effect of the principle of *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease* (4). (iv) He might object that, as the alteration would not add to the letting value of the premises, he would have to undo it and reinstate the old conditions at the end of the term.

Of these, the first ground, I believe and hope, remains unaffected by anything in the Act of 1927. No court, as I hope and believe, will ever hold that, under sect. 19 (2) a landlord must consent to the hideous degradation of the front of his building by the fitting of a sheet of plate glass, and be satisfied by a money payment for the loss of graceful eighteenth-century windows. A glance at the photograph of these premises shows that no æsthetic considerations can be involved in this case, however.

As regards the second, third, and fourth grounds, the section makes express provision. The landlord must not unreasonably withhold his consent :

> but this proviso does not preclude the right to require as a condition of such licence, or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require . . . an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.

Anticipating the right of the plaintiffs to make such requirements, the defendants' solicitors, in their letter of Jan. 4, 1937, wrote :

> Our clients are prepared as a condition of such licence to execute a deed containing : (i) an undertaking to reinstate the said premises in the condition in which they were before the proposed alterations were executed ; (ii) a provision for satisfactory security for the performance of the said undertaking ; (iii) an undertaking to pay all your clients' legal and other expenses properly incurred in connection with such licence.

The provision for security for performance of the undertaking to reinstate was in fact a policy of the Alliance Assurance Co. It is admitted that, so far as it is humanly possible to guarantee the due performance of building works in Bournemouth in Feb., 1973, the undertaking cannot be more satisfactorily secured.

Of the conditions which the landlord has a right to require there therefore remains only one—namely, the payment of " a reasonable sum in respect of any damage to or diminution in the value of the demised premises," for there has been no suggestion of any damage to or diminution in the value of any neighbouring premises belonging to the plaintiffs, and no suggestion that any do belong to them.

Having regard to what I have said, it follows that, in my view, upon receipt of the letter of Jan. 4, 1937, the plaintiffs were obliged by the section to give their consent, subject only to a requirement that the defendants should pay them a reasonable sum in respect of any damage to, or diminution in the value of, the demised premises by reason of the alterations. The plaintiffs have given no consent. It follows that, *prima facie,* they have unreasonably withheld their consent. Simonds, J., held that they had not unreasonably withheld consent. He came to that conclusion on the ground that the plaintiffs, if desirous of requiring the payment of a reasonable sum, must quantify the amount they required, and, if it should thereafter be held that they had named too large a sum, they would be held to have acted unreasonably, and the defendants need pay them nothing. In view of this hazard, he thought that the plaintiffs did not act unreasonably in not consenting at all. I cannot accept this reasoning. In the first place, it would render the operation of the Act wholly nugatory in every case in which the amount claimable by the landlord is uncertain. This seems to be an invention or evasion for the continuance of the mischief which the statute was designed to remedy. Secondly, I see no reason why the plaintiffs need have specified the sum they demanded. They could in perfect compliance with the Act have replied to the letter : " We give our consent provided you pay us a reasonable sum for damage to, or diminution in the value of, the premises. We are advised that such sum should be £X, but, if you do not agree with that estimate, the difference between us must be settled by some competent tribunal." Such a dispute, merely as to the quantum of an admitted liability, may commonly arise, for example, under the Sale of Goods Act, 1893, s. 8. Thirdly, I entirely dissent from the view that, if the plaintiffs had named the sum which they considered to be reasonable, and it were subsequently held to be too much, the court would hold that they had unreasonably withheld their consent. It is true that, if a lessor attaches to his consent a condition that the court thinks is unreasonable, it may make a declaration that the lessee may act without any further consent of the lessor : *Young* v. *Ashley Gardens Properties, Ltd.* (5). If, in answer to the letter of Jan. 4, 1937, the plaintiffs had said, " We give our consent provided you pay us £X, and we will not take a penny less," that result might follow when £X was found to be too much, but it would not follow if they said : "We give our consent provided you pay a reasonable sum, and we are advised and consider that £X is such a sum."

This view, I think, is impliedly supported by the previous decision of this court. The plaintiffs (then the defendants) were held not to have unreasonably withhold their consent when they coupled with it a request for £7,000, the sum which their expert witness estimated to be proper. The court, however, did not go on to say that they agreed with that expert and find that £7,000 was the proper sum. Seeing that an equally competent witness for the defendants (then the plaintiffs) said that the proper sum was *nil*, it is not surprising that the court appears to have been unable to arrive at any finding as to the proper amount. However, I am only concerned to point out that it was held that the present plaintiffs had not unreasonably withheld their consent, though they asked for a sum which was not shown to be the reasonable sum they were in fact entitled to demand.

It results, in my view, that the ground on which SIMONDS, J., held that the plaintiffs did not unreasonably withhold their consent is fallacious.

The consent asked for in the defendants' solicitors' letter of Jan. 4, 1937, was never given. The only real answer to it was the plaintiffs' solicitor's letter of Feb. 10, 1937, saying that they proposed by the present litigation to settle all doubts as to the construction of the statute before deciding whether to give or to withhold consent. I do not think that this is any justification for not giving consent. *Ignorantia legis neminem excusat,* not even if it is an uncertainty as to the meaning of the statute which has caused Lords Justices to differ.

In the result, I think that the plaintiffs have unreasonably withheld their consent, and that the defendants are entitled to carry out the proposed works without it. The plaintiffs may have been in some difficulty, but I confess that I do not feel much sympathy for them. The defendants as long ago as Aug. 11, 1936, offered to submit to arbitration the question of the amount to be paid by them. That was a proposal which I think reasonable people would have accepted. I cannot help having a suspicion, which I hope is ill-founded, that the subsequent lengthy and dilatory correspondence may have been subtle inventions and evasions for the continuance of the mischief sought to be remedied by the statute. I am therefore of opinion that in this action there should be judgment for the defendants, upon the claim, with costs, and, upon the counterclaim, judgment for the defendants with costs for the three declarations asked for.

Appeal dismissed with costs. Cross appeal allowed with costs. Leave to appeal given to both parties.

Solicitors : *Robins, Hay & Waters* (for the appellants) ; *Lovell, White & King* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

TAYLOR *v.* RICHARDSON.

[KING'S BENCH DIVISION (Branson, Humphreys and du Parcq, JJ.), **May 12, 1938.**]

Solicitor—Suspended from practice for two years—Nâme remaining on roll of solicitors—Use of description "solicitor" while no practising certificate in force—Whether intention to imply that qualified to act as solicitor—Solicitors Act, 1932 (*c.* 37), *s.* 46

The respondent was suspended from practice as a solicitor for a period of two years, but his name remained upon the roll of solicitors. During the period of suspension, one E., who had known the respondent for about three years but was unaware of his suspension from practice, called at his private house on several occasions on a matter of business, when the respondent described himself as a solicitor. The respondent also witnessed two documents in connection with E.'s matter of business, and added the word "solicitor" to his signature on both occasions. The respondent was charged with having wilfully used, while not having in force a practising certificate, a title or description implying that he was qualified to act as a solicitor, contrary to the Solicitors Act, 1932, s. 46. The respondent contended that, as his name was still on the roll of solicitors, he was entitled to describe himself as a solicitor, and that the documents he had witnessed could have been witnessed by any other person. The magistrate upheld the respondent's contentions and dismissed the charge, holding that there was no case for the respondent to answer:—

HELD: as the respondent, when approached on a matter of business, described himself as a solicitor, he was, in the circumstances, using that description to imply that he was qualified to act as a solicitor, and there was, therefore, a case for the respondent to answer.

[**EDITORIAL NOTE.** The question here is whether a solicitor who has been suspended from practice but not struck off the roll can describe himself as a solicitor. This is said to be dependent upon the circumstances, so that, if the description is used without any implication of his being entitled to practise, no offence is committed; but it is otherwise where, upon a consideration of all the facts, it is clear that the impression that he is then entitled to practise will have been conveyed.

AS TO DISQUALIFIED PERSONS, see HALSBURY, 1st Edn., Vol. 26, Solicitors, pp. 855-857; paras. 1389, 1390; and FOR CASES, see DIGEST, Vol. 42, pp. 411, 412, Nos. 4724-4746.]

APPEAL by way of case stated from a decision of a metropolitan police magistrate. The facts and the arguments are set out in the judgments.

R. P. Croom-Johnson, K.C., and *W. M. Andrew* for the appellant.

Harry Allan for the respondent.

BRANSON, J.: This is an appeal by way of case stated from the decision of one of the magistrates of the police courts of the metropolis who dismissed an information preferred by one Noel Leigh Taylor under the Solicitors Act, 1932, against Joseph Ashfield Richardson for that he on June 1, 1937, did, not having in force a practising certificate, wilfully use a title or description implying that he was qualified to act as a solicitor, contrary to sect. 46 of the Solicitors Act. The information came on before the magistrate, who dismissed it upon a submission that no case had been made out for the respondent to answer. The facts hwich are stated are that the respondent was admitted a solicitor in

1898, and that on Dec. 19, 1935, he was by order of the disciplinary committee constituted under the Act suspended from practice as a solicitor for a term of two years from that date. He appealed to this court, which dismissed his appeal on Apr. 22, 1936, and ordered that the term of suspension should run from the date of the dismissal of his appeal. Prior to his suspension from practice, the respondent did A practise under the style of Russell, Dickson & Lawrence, at 10, Lower John Street, W.1. After the suspension, the respondent's practice was taken over by another solicitor, C. H. James, who carried it on at the said address under the style of Russell, Dickson & Lawrence. Mr. James made application to the Law Society under sect. 52 of the Act for B permission to employ the respondent as his clerk in connection with the practice, but the Law Society refused the request. The name of the respondent, though he was suspended from practice, remained upon the roll of solicitors, and in Apr., 1937, as the case finds, one Angus Wynn Ellis called upon the respondent at his private house at Maidenhead. C Ellis had known the respondent for three years or thereabouts, and knew that he was an admitted solicitor, but was not then aware that the respondent had been suspended from practice. Ellis informed the respondent that he had come to see him on business, and stated that he wanted to raise a reversion on his father's will. The respondent replied D that he dealt in reversions every day. At a further interview which Ellis had with the respondent, the respondent handed him a visiting-card, and said : " That is my firm." The card had printed upon it the following words :

> Telephone : Gerrard 4219. Russell, Dickson & Lawrence, Solicitors, 10, Lower E John Street, Golden Square, W.1.

The case goes on to say that " on several occasions Ellis called on the respondent at 10, Lower John Street, aforesaid." The respondent told Ellis that he was a partner in the firm of Russell, Dickson & Lawrence, and on one occasion introduced Mr. C. H. James to Ellis as a partner F in the firm. Ellis said that he regarded the respondent as an introducer for the purpose of raising money upon reversions. Ellis had seen the notepaper of Russell, Dickson & Lawrence, and Ellis regarded the money paid by him to the respondent as commission.

On May 11, 1937, the respondent took Ellis to the offices of Manley G Estates, Ltd., and there Ellis signed a promissory note in exchange for which he received a cheque. Ellis also signed and sealed a document purporting to be a charge, whereby, in consideration of Manley Estates, Ltd., discounting his promissory note for £100 and interest, Ellis charged in favour of Manley Estates, Ltd., all his interests arising under the will H of his deceased father. That document was witnessed by the respondent as follows : " J. A. Richardson, 10, Lower John Street, W.1, Solicitor." On leaving the office of Manley Estates, Ltd., Ellis cashed the cheque for £75, and out of the proceeds handed £20 to the respondent, at the respondent's request, for commission. Later on there was a similar transaction on June 1, 1937, and again the charge was witnessed by Richardson, describing himself as "solicitor." Then a bill of costs was subsequently rendered by Russell, Dickson & Lawrence, which contained *inter alia*, items for certain attendances on Ellis by the respondent.

In those circumstances, counsel for the defendant submitted :

> that on the above facts it has not been shown that the defendant has done anything which he was not entitled to do ; that the defendant was an admitted solicitor and was therefore entitled to describe himself as a solicitor.

The appellant contended, amongst other things, that the use of the name, title, addition, or description of "solicitor" by any person not having in force a practising certificate is in itself calculated to convey to members of the public and implies that such person is qualified or recognised by law as a qualified solicitor. Alternatively, it was contended that the whole course of dealing between the respondent and Ellis ought to be taken into consideration in deciding whether the respondent, by the use of the word "solicitor" on June 1, intended to imply that he was qualified, or recognised by law as qualified.

The respondent's contentions were that, as an admitted solicitor, still upon the roll, he was entitled to describe himself as a solicitor, that in this particular case he acted merely as an introducer who got a commission, and that the charge the respondent witnessed might equally well have been witnessed by anybody else.

Upon those facts, the magistrate came to the conclusion that, since the respondent's name was on the roll of solicitors on June 1, and since it was not necessary that the charge which the respondent witnessed should be witnessed by a solicitor qualified to practise, his use of the title and description was not an infringement of the Act, and he dismissed the information. The question for this court is whether the magistrate in so deciding came to a correct determination in point of law. In my opinion, he did not. Upon the facts which he finds—that the respondent, when Ellis called upon him and said that he had come to see him on business and that he wanted to raise a reversion on his father's will, was obviously being approached as a solicitor who was entitled to practise, and that, when, at the further interview which Ellis had with the respondent, the respondent handed to Ellis a visiting-card upon which there are the words : "Russell, Dickson & Lawrence, Solicitors" —the respondent was, in my opinion, using the title of "solicitor" to imply that he was qualified to act in that capacity. I find it very difficult to see, when one looks at sect. 46, what title, addition, or description the legislature thought it likely that a man would use as implying that he was qualified to act as a solicitor, other than the description "solicitor." One would never expect to find a man describing himself as a solicitor with a valid practising certificate or a solicitor qualified to act in that capacity. In my view, if a man is approached upon a matter of business and describes himself as a solicitor, without any qualification of those words, he is holding himself out as a solicitor qualified, and recognised by law as qualified, to act as such. The result, in my opinion, is that this appeal should be allowed, and that the case should go back to the magistrate, with the direction that he was wrong in accepting the submission that there was no case to answer, and that he should hear and determine the case in full.

Humphreys, J.: I am of the same opinion. The magistrate in this case states his opinion as follows:

> I was of opinion that (*a*) since the respondent's name was on the roll of solicitors on the said June 1, 1937, and (*b*) since it was not necessary that the charge which the respondent witnessed should be witnessed by a solicitor qualified to practise; therefore the respondent's use of the title or description was not an infringement of the Act, notwithstanding that he had not in force a practising certificate.

If that means, as I am disposed to think it does mean, that the magistrate came to the conclusion as a matter of law that the use of the word "solicitor" by a person whose name is on the roll of solicitors cannot be an indication that he is qualified, or recognised by law as qualified, to act as a solicitor, then, in my view, the magistrate came to a wrong decision in point of law. In truth, I think that the matter is a mixed question of law and fact. I certainly would not myself express the opinion that the use of the word "solicitor" by a person whose name is on the roll of solicitors would necessarily be any indication that that person was qualified to act—that is to say, had a practising certificate. On the other hand, it must be perfectly obvious that there are circumstances in which the mere statement by a person that he is a solicitor is an indication, and is intended as an indication, that he is a solicitor for the purposes for which he is discussing some matter with the other person. In other words, that he has a practising certificate, and is entitled to practise. In my view, the magistrate has given no reasons for the conclusion at which he arrived, and I go so far as to say that there was no evidence in this case on which he could come to the conclusion that the meaning to be attached to the expression "solicitor" and to the other acts of the respondent was other than the implication that he, the respondent, was qualified, or recognised by law as qualified, to act as a solicitor—in other words, that he was a solicitor who had a practising certificate. I agree with the judgment which has been pronounced by Branson, J.

du Parcq, J.: I agree. I think that it is easy to see how the magistrate fell into error here, and I think also that the first of the appellant's contentions is put in terms which are not too wide. I think that the magistrate looked at the matter in this way. The charge before him was a charge of wilfully using a title or description implying that the respondent was qualified to act as a solicitor on June 1, 1937. The magistrate confined his attention much too closely, as it seems to me, to the particular incident on June 1, 1937, which was the occasion of the charge, and he said in effect that what he found was that on that day the respondent witnessed a signature and described himself as a solicitor. Then, said the magistrate, he is a solicitor in the sense that his name is on the roll, and by merely witnessing a signature to a deed he was not representing anything, and no representation was to be implied.

It is quite impossible, as it seems to me, in a case of this kind, to look so narrowly at one particular incident, without looking at the surrounding circumstances. When the law speaks of a "name, title, addition, or description implying" certain things, it is essential to look at the circumstances in which the name or title, or whatever it may be, is used, in order to see what it does imply. There might, as it seems to me, be occasions where a retired solicitor who had no practising certificate might describe himself as a solicitor, and the circumstances would be such that nobody could say that the use of the title implied that he was at the time qualified to act. On the face of it, however, and subject to any evidence that may be called to contradict the facts at present before this court, I agree with the other members of the court that it is difficult to imagine any case in which it more clearly appeared that the title was so used as to imply that the respondent was qualified to act as a solicitor. I therefore agree that this case should go back, in order that any defence that there may be may be heard.

Appeal allowed with costs, and case remitted back to the magistrate to hear and determine the case in full.

Solicitors: *Hempsons* (for the appellant); *J. Thompson Halsall* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

DAVIES *v.* COWPERTHWAITE.

[KING'S BENCH DIVISION (Branson, Humphreys and du Parcq, JJ.), **May 11, 1938.**]

Local Government—Urban district council—Whether councillors guilty of misconduct in passing resolution—Previous warning by clerk to council that purpose of resolution unlawful—Whether loss or deficiency caused by councillors' misconduct—Liability to be surcharged—Local Government Act, 1933 (*c.* 51), *s.* 228 (1) (*d*).

Dictum of BRANSON, J., at p. 689, *criticised.* PENTECOST *v.* LONDON DISTRICT AUDITOR. [1951] 2 All E.R. 330.

By a resolution dated Sept. 9, 1936, an urban district council resolved to make a contribution of £30 out of the rate fund in support of a march of unemployed persons to London to protest against the unemployment assistance regulations. The resolution was passed, although the clerk to the council advised that such a payment would be illegal and that the members of the council responsible therefor would be liable to be surcharged. On Sept. 23, the present appellant obtained an interim injunction in the High Court restraining the council from making the proposed contribution from the rate fund. On Sept. 28, the matter was further considered at a special meeting of the council when counsel's opinion was submitted to the meeting and a resolution was passed rescinding the minute of Sept. 9 authorising the contribution of £30, and agreeing to abide by the injunction. The council also authorised the clerk to instruct counsel to appear in court and consent to the injunction being made perpetual, but to object to the payment by the council of the costs incurred. The court, however, ordered the council to pay the costs of the proceedings which had been brought about by the council's resolution of Sept. 9. The amount of the taxed costs was £65 5*s.* 8*d.*, and in addition the costs of the London agents of the clerk to the council amounted to £19 16*s.* 4*d.* The bills of costs were presented to the next council meeting on Dec. 9, when it was resolved that the total costs of £85 2*s.* should be paid. Later, the district auditor was asked to surcharge that amount upon the members of the council responsible for the resolution of Sept. 9, and also on the members of the council who on Dec. 9 authorised payment of the costs. After consideration, the auditor found that the members of the council who passed the resolution of Dec. 9 had acted legally and properly, as the said costs consisted of debts legally and properly due by the council, and that the action of the members who voted in support of the resolution of Sept. 9 was not an act which called for surcharge under the Local Government Act, 1933, s. 228 (1) (*d*), which imposed a duty on the district auditor "to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred." Thereupon this appeal was brought, and it was now contended that the members of the council who voted for the resolution of Sept. 9 were persons guilty of negligence or misconduct, and that the said sum of £85 2*s.* paid by the council was a loss or deficiency incurred by reason of that negligence or misconduct:—

Held: as the members of the council who passed the resolution of Sept. 9 did so notwithstanding the advice of the clerk to the council that the proposed contribution was illegal, and without disputing the correctness of such advice, they were guilty of misconduct within the meaning of the Local Government Act, 1933, s. 228 (1) (*d*), and, as the costs incurred amounted to a loss or deficiency caused by such misconduct, the said sum of £85 2*s.* should be surcharged upon those members who voted for the resolution of Sept. 9.

[**EDITORIAL NOTE.** Payments by a local authority are necessarily authorised by resolution of the authority or one of its committees, and the members or parties to such a resolution are responsible for the legality of the payment. They are, however, only responsible in a case where the illegality of the payment is one which must be obvious to them or one as to the illegality of which they have been advised by their proper officer and they do not question the accuracy of his advice. The procedure for recovering such payment is by a surcharge by the auditor, and such surcharge can be made only where a loss has been incurred through negligence or misconduct. It is here held that a resolution authorising a payment passed against the advice of the clerk to a local authority is misconduct within the Local Government Act, 1933, s. 228 (1) (*d*), and the members voting for it are liable to be surcharged in respect of consequential expenses of the council.

As to Improper Payments by Local Authorities, see HALSBURY, Hailsham Edn., Vol. 21, pp. 223, 224, para. 415; and for Cases, see DIGEST, Vol. 33, pp. 19, 20, Nos. 76-86.]

Case referred to:

(1) *R.* v. *Browne*, [1907] 2 Ir. R. 505;

Appeal against a decision of the district auditor, Robert Cowperthwaite, of the Audit District No. 6, who refused to surcharge a payment of £85 2*s.* for legal expenses paid by the Rhondda Urban District Council.

A. S. Comyns Carr, K.C., and *Leslie David* for the appellant.

Arthur Morley, K.C., and *Denis Robson* for the respondent.

Erskine Simes for Rhondda Urban District Council.

Branson, J.: This is an appeal against the decision of the district auditor, Robert Cowperthwaite, of the Audit District No. 6, who refused to surcharge a payment of £85 2*s.* for legal expenses paid by the Rhondda Urban District Council.

The grounds of the appeal are:

> that the sum of £85 2*s.* being as to £65 5*s.* 8*d.* taxed costs in the action *Davies and Williams* v. *Rhondda Urban District Council* ordered to be paid by the defendants to the plaintiffs was expenditure, and as to £19 16*s.* 4*d.* legal costs of the law agents of the Rhondda Urban District Council incurred as the result of illegal acts—namely, the resolution of the Rhondda Urban District Council, dated Sept. 9, 1936, to make a contribution of £30 out of the rate fund to a committee responsible for arranging a march of unemployed persons to London, and that the acts of the councillors voting for this illegal resolution which resulted in the said legal costs being incurred was an act meriting surcharge under the Local Government Act, 1933, s. 228 (1) (*d*).

The matter arises in the following way. By a resolution of Sept. 9, 1936, the Rhondda Urban District Council resolved to support a march of the unemployed, which was to take place in connection with a protest against the Unemployment Assistance Regulations, 1936. The resolution was passed, although the clerk advised that there was no authority in law for making any such payment, and that, if a payment were made, it would be illegal, and that the members voting and being responsible for incurring or authorising the expenditure would be liable to be surcharged. As soon as the passing of that resolution became known to him, the present appellant and Mr. Williams applied to the vacation court before LEWIS, J., and got an interim injunction on Sept. 23, restraining the council from contributing moneys out of the rate fund towards the expenses of the march of the unemployed. The information with regard to that was sent by telegram on Sept. 23 to the clerk of the council, who brought it before the council on that day. The council considered the matter, and resolved to consider it further at a special meeting summoned for Monday, Sept. 28. The clerk to the council in his affidavit says that upon Sept. 24 the writ and notice of motion were duly served upon the council, and that upon the receipt of that writ he instructed his London agents to take counsel's opinion. Counsel's opinion was taken, and was submitted to the urban district council at the special meeting held on Sept. 28. On that day the council passed a resolution rescinding the minute of Sept. 9 authorising the contribution of £30, and undertaking to abide by the injunction. Further, they resolved that, in view of the opinion that they had received, and the granting of the injunction, they pledged themselves individually to forward to the marchers' fund the donation of £30 which they had on Sept. 9 resolved to pay out of the rate fund. They also at the same meeting authorised the clerk to appear at the hearing of the motion and to retain counsel. When the case came on, they appeared by counsel and consented to judgment, treating the motion as a motion for judgment, and consented to the injunction being made perpetual. They resisted the suggestion of the plaintiffs in that action, however, that they should be made to pay the costs. Nevertheless, the court, having heard all that had to be said by either party, decreed that the council should pay the costs of the proceedings which their resolution had brought about. The bill of costs was taxed at the amount of £65 5*s*. 8*d*., and the costs of the London agents of the clerk to the council amounted to another £19 16*s*. 4*d*.

At the next meeting of the council, held on Dec. 9, the clerk reported to the council, and presented the bills of costs, amounting to £85 2*s*., and it was resolved that the bills of costs as submitted should be paid. When it came to the audit, objection was taken to the allowance of that sum of £85 2*s*. It was submitted that the payment of that sum was expenditure incurred as the result of an illegal act, and the auditor was desired to surcharge that amount upon the members of the council responsible for the resolution of Sept. 9, and also on the members of the council responsible for the payment on Dec. 9. The auditor, having considered the matter, found, first of all, that the expenditure was legal and necessary, and should be allowed, because, as he says, as to £65 5*s*. 8*d*., it was a debt legally due from, and enforceable upon, the Rhondda Urban District Council by an order of the Court of Chancery, and as to the £19 16*s*. 4*d*. it was a debt legally and properly due from, and enforceable upon, the Rhondda Urban District Council, being the legal costs of the law agents engaged and employed by the council in defence of the action. He certified that the members of the council responsible for the resolution of Dec. 9 authorising the payment of the said sum of £85 2*s*. acted legally and properly, and might not be surcharged. With regard to that finding, as I understand the matter, it is not now contended that the auditor was wrong. The £65 5*s*. 8*d*. was due under an order of the Court of Chancery. The £19 16*s*. 4*d*. was due under the contract of employment of the London agents by the clerk to the council, an employment which he was authorised to effect, so that those responsible for the resolution of Dec. 9 were only doing what they were legally compellable to do, and were voting for the due discharge of legally enforceable debts against the council. Then he goes on with regard to the next submission of the objectors, which was that the amount of £85 2*s*. should alternatively be surcharged upon the members of the council responsible for the resolution of Sept. 9. He gives his reasons for certifying that that submission could not be upheld—first, because he says that the people who voted for the contribution of the £30 towards the expenses of the march of the unemployed persons to London were not acting illegally, because no payment was made as the result of and in accordance with the said resolution. Then he finally says:

> Because without expressing any view upon the legality of the said resolution, the action of the members voting in support of it was not an act meriting surcharge under the terms of the Local Government Act, 1933, s. 228 (1) (*d*).

It is against the decision with regard to the members of the council responsible for the resolution of Sept. 9, 1936, that this appeal is really pressed.

The Local Government Act, 1933, s. 228 (1), says:

> It shall be the duty of the district auditor at every audit held by him . . . (*d*) to

> surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred.

What is said here is that the members of this council who voted for the resolution of Sept. 9 were persons guilty of negligence or misconduct, and that this sum of £85 2*s*. which the council has had to pay is a loss or deficiency incurred by reason of that negligence or misconduct.

The objections taken by the district auditor and by the council are, first of all, that it is impossible to say that those who voted for the resolution of Sept. 9 were in any sense, within the meaning of this section, guilty of negligence or misconduct. The question then arises whether that can be supported. In my view, it really turns upon a question of fact, and must be decided as such. It is true that, in the Irish case of *R.* v. *Browne* (1), LORD O'BRIEN, L.C.J., at p. 518, drew attention to the fact, in dealing with sect. 20 of the Act of 1902, which, so far as is material, is in the same language as is the section with which we have to deal, that the word "negligence," being associated in the section with the word "misconduct," involves, he thinks, some element of moral culpability. With great respect, I agree. I should not be prepared to hold that a member of a council, even though he were advised by the clerk that an act that he was proposing to do was not lawful, would necessarily be guilty of misconduct if, nevertheless, honestly believing that the advice which was given to him was erroneous, he proceeded to do that act. So also do I agree, with great respect, with what LORD O'BRIEN, L.C.J., says at p. 519. He points out there that mere imprudence or want of judgment, or even a grave error of judgment, cannot be called misconduct. It is a different matter, however, if it appears that, notwithstanding a warning that the conduct which is proposed is unlawful, and without in any way combatting the correctness of that advice, a member of a council nevertheless takes part in passing a resolution which he is told is an illegal resolution. That is what, in my view, has been done by the members of this council who voted for the resolution of Sept. 9. It has been pointed out in argument that not one of them has at any time come forward to say that he voted for the resolution under the impression that it was a lawful thing to do. On the contrary, it is said that, when they were warned of the illegality of what they were proposing to do, the individual councillors said: "Well, never mind. If we cannot do it lawfully, we will pay the money ourselves." It seems to me that to act in that way does amount to misconduct, within the meaning of sect. 228 (1) (*d*). Therefore, if the next point which is taken is not unsound, the auditor has come to a wrong conclusion in this case.

The next point is that this sum of £85 2*s*. is a loss or deficiency which has been incurred by reason of that misconduct. The answer which is suggested to that by those who support the decision of the auditor is that, because the present appellant might have stopped, or might have prevented, the loss of the £30 to the ratepayers of the urban district in a cheaper way than that of moving the High Court for an injunction, it cannot be said that the costs which have been occasioned by his action in coming to this court can be said to have been incurred by the misconduct of the people who passed the resolution. It seems to me that that really is saying that, if a district council are proposing to spend the ratepayers' money upon a matter which an objector considers to be illegal, it is his duty, if the sum is small, not to incur the costs of coming to the High Court to prevent that unlawful act from being done, but to wait until the audit, and then to get the money back from those who have wrongly voted it from the accounts by means of a surcharge. I, for my part, cannot see that that argument can prevail to prevent it from being said that the costs which the court has ordered the council to pay because of its illegal vote are not costs which amount to a loss or deficiency brought about by reason of the misconduct of those who voted for that resolution, and whose conduct was the *fons et origo* of the whole of the trouble.

For these reasons, I have come to the conclusion that this appeal should be allowed, to the extent of saying that the auditor should have certified that the £85 2*s*. should be surcharged upon the members of the council who were responsible for the resolution of Sept. 9, 1936.

Humphreys, J.: I agree with every word of the judgment which has been delivered, and I cannot usefully add anything.

du Parcq, J.: I also agree, and I only wish to say that, speaking for myself, I think that a case of negligence and misconduct is made out. These councillors acted in a way in which no reasonable men, acting reasonably, and desirous of doing their duty to the ratepayers according to law, would have acted. I feel no doubt that, applying such a canon, these councillors acted negligently and were guilty of misconduct, and that, as has been said by Branson, J., all the loss which has been suffered is attributable to their action. I agree in the result which follows.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Norman Morgan & Co.*, Cardiff (for the appellant); *Sharpe, Pritchard & Co.* (for the respondent); *Lees & Co.*, agents for *D. J. Jones*, Pentre, Glam. (for the Rhondda Urban District Council).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

Re WHITE, SKINNER *v.* ATTORNEY-GENERAL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **April 7, 8, May 10, 1938.**]

Estate Duty—Testator domiciled in Northern Ireland—Annuity given to widow—Property locally situate in Northern Ireland at testator's death and duty paid there—Part of property locally situate in England at widow's death—Liability to duty—Whether exemption still applicable—"Property upon which estate duty already paid"—Finance Act, 1894, (*c.* 30), *ss.* 2 (1) (*b*), 5 (2)—*Finance Act,* 1914 (*c.* 10), *s.* 14—*Government of Ireland Act,* 1920 (*c.* 67), *ss.* 8, 61—*Government of Ireland (Adaptation of Taxing Acts) Order,* 1922 (*S.R. & O.,* 1922, *No.* 80).

The testator, who died on July 27, 1923, domiciled in Northern Ireland, had, by a testamentary disposition dated Dec. 2, 1920, given an annuity of £7,500 to his wife. At the date of his death, only property to the value of £66 was locally situate in Great Britain, and no estate duty was then payable in Great Britain. Duty was, however, paid in Northern Ireland. On Feb. 5, 1936, the testator's widow died, and at that date the property charged with the payment of her annuity consisted in part of investments locally situate in England, in part of investments locally situate in Northern Ireland, and in part of property situate in the United States of America. A claim was put forward for estate duty in England in respect of the English investments as property deemed to pass on the death of the widow. It was contended (i) that the widow had no interest in these investments, but only a right to bring an administration action in Northern Ireland, and (ii) that, by the operation of the Finance Act, 1894, s. 5 (2), no duty was payable on the death of the widow, as estate duty had been paid on the death of her husband :—

HELD : (i) the annuity was an interest within the meaning of the Finance Act, 1894, s. 2, in the property situate in England.

(ii) the words "estate duty" in the Finance Act, 1894, s. 5 (2), mean estate duty in England. The fact that duty is still levied under the same Act, since the passing of the Government of Ireland Act, 1920, does not make the duties levied in the two countries one duty.

Decision of CLAUSON, L.J. ([1938] 1 All E.R. 378) *affirmed.*

[**EDITORIAL NOTE.** The right of an annuitant where there is a gift of an annuity followed by a residuary gift has been said to be such that the residuary legatees have no right to receive anything until the annuity has been discharged. Such a right, amounting clearly to a charge upon the property, seems plainly to be more than a right to ask for the administration of the estate. The exemption which was given by the Finance Act, 1894, s. 5 (2), has been amended by the Finance Act, 1910, s. 55, and by the Finance Act, 1914, s. 14, and now applies only to the case of the duty payable on the death of the surviving spouse, where duty has been paid on the death of the deceased spouse ; but even this remaining exemption is now held not to apply where the previous duty was not paid to the revenue authorities in Great Britain.

AS TO THE SCOPE OF DEATH DUTIES IN GREAT BRITAIN, see HALSBURY, Hailsham Edn., Vol. 13, pp. 226, 227, paras. 211-213 ; and FOR CASES, see DIGEST, Vol. 21, p. 17, Nos. 89-96.]

Cases referred to :

(1) *A.-G.* v. *Watson,* [1917] 2 K.B. 427 ; 21 Digest 10, *37* ; 86 L.J.K.B. 1034 ; 117 L.T. 187.

(2) *In the Goods of Ewing* (1881), 6 P.D. 19 ; 23 Digest 92, *856* ; 50 L.J.P. 11 ; 44 L.T. 278.

(3) *Sudeley (Lord)* v. *A.-G.,* [1897] A.C. 11 ; 23 Digest 463, *5354* ; 66 L.J.Q.B. 21 ; 75 L.T. 398 ; *affg.,* [1896] 1 Q.B. 354.

(4) *A.-G.* v. *Johnson*, [1907] 2 K.B. 885; 21 Digest 98, *718*; 76 L.J.K.B. 1150; 97 L.T. 720.

Appeal by the plaintiffs from an order of Clauson, L.J., dated Jan. 25, 1938, and reported in [1938] 1 All E.R. 378. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

Cyril J. Radcliffe, K.C., J. M. Whitaker and *F. Renfield* for the A appellants.

J. H. Stamp for the respondent.

Sir Wilfrid Greene, M.R. [delivering the judgment of the court]: The testator John Campbell White died on July 27, 1923, domiciled in B Northern Ireland. By his will, dated Dec. 2, 1920, he appointed his two nephews the plaintiffs, Robert Skinner and Edward John Skinner, the plaintiff George Herbert Wheeler and William John McMillan (who died on May 1, 1933) to be his executors. He bequeathed to his wife Edith Evelyn White an annuity of £5,000 (increased by a codicil to £7,500) C free of income tax and sur-tax, and to his housekeeper an annuity of £100 (increased by the codicil to £200) free of income tax. Then, after bequeathing certain pecuniary legacies, he devised and bequeathed all his property real and personal not thereby otherwise disposed of to his two nephews, in equal shares, subject to and charged with the payment D of his debts, funeral and testamentary expenses, and all Crown duties, and the legacies and annuities bequeathed. Neither the will nor the codicil declared any trusts, and there was no appointment of trustees. The will and codicil were proved in Northern Ireland by the four executors on Dec. 3, 1923, and the grant of probate was resealed in England on E Nov. 2, 1933.

The estate of the testator at the date of his death consisted of real and personal estate in Northern Ireland, personal estate in the Irish Free State, personal estate in England (valued at £66 8*s.* 1*d.*), and real and personal estate in the United States of America. The executors F paid estate duty to the Ministry of Finance in Northern Ireland on the entirety of the testator's personal estate and upon his real estate in Northern Ireland. No estate duty was paid in England, owing to the smallness of the value of the English property.

The real and personal estate of the testator in the United States of G America consisted of the residuary real and personal estate of his brother, James Brice White, who at his death was domiciled in that country. By his will James Brice White appointed the testator and his two nephews to be trustees thereof, and, after making a specific devise of certain real estate, and bequeathing certain pecuniary legacies and annuities, and H directing that in certain events certain capital sums should be raised, he devised and bequeathed his residuary estate in trust for the testator absolutely.

At the death of the testator, the residuary real and personal estate of James Brice White had been ascertained and determined, but no provision had been made for any of the annuities or capital sums bequeathed by his will.

After the death of the testator, the two nephews, as surviving trustees of James Brice White's will, being satisfied that the entirety of his residuary estate was not required for the purpose of providing for the A annuities and capital sums, released portions of the residuary real estate from any liability to provide for them. The portions so released were sold from time to time during the lifetime of the testator's widow, and the proceeds were handed over to the executors of the will of the testator. The remaining portions of the residuary real and personal estate of B James Brice White are still held by the two nephews, as the surviving trustees of his will, in trust for the executors of the will of the testator, subject to provisions being made thereout for the annuities and capital sums bequeathed by the will of James Brice White. These remaining portions are still locally situate in the United States of America. With C the exception of these portions of James Brice White's estate, the whole of the estate of the testator (including the portions of the residuary real and personal estate of James Brice White which had been released as above stated) was sold during the lifetime of the testator's widow. With the exception of certain liabilities in the United States of America, to D be presently mentioned, all the debts, funeral and testamentary expenses of the testator, and all duties payable on his death, and all the legacies bequeathed by him, had been paid, and the balance (except a sum of £7,000 invested in Belfast Corporation stock), amounting to the sum of £231,713, had been, and, at the death of the widow, still was, invested E in English securities. Of this sum of £231,713, the sums of £46,597 and £153,712, respectively, represented proceeds of sale of real and personal estate in the United States of America.

On the death of the testator, no claim was made by the United States authorities for estate duty upon his interest in the residuary real and F personal estate of James Brice White, but in 1934 the executors of the testator were called upon to pay such duty. At the death of the testator's widow, this claim had not been settled, and there were also certain legal expenses unpaid, which had been incurred in the United States of America in connection with the administration in that country. G The claim for duty was finally settled at $113,489.90, and this sum was paid on Sept. 23, 1936. The legal expenses, amounting to $10,506, have also been paid.

By a deed dated Dec. 17, 1934, George Herbert Wheeler purported to retire from the trusts of the will and codicil of the testator. The deed H contained a vesting declaration, and provisions for transferring to the two nephews certain investments mentioned in the schedule. As I have already stated, there were no trusts declared and no trustees appointed by the will and codicil of the testator, and this document accordingly was not effective for the purpose stated in it. It could not, of course, discharge George Herbert Wheeler from the office of executor.

The testator's widow died on Feb. 6, 1936. The position with regard to the testator's estate at the date of her death may be summarised as follows. With the exception of the portions of the real and personal estate of James Brice White retained in the United States of America and charged with the annuities and capital sums bequeathed by his will, and the £7,000 Belfast Corporation stock, the entire estate consisted of English investments. The only outstanding liabilities of the testator's estate were the claim of the United States authorities for estate duty, for which the testator's executors were personally liable, and the legal expenses already mentioned. Subject to these liabilities, the estate was still retained by the executors for the purpose of securing the widow's annuity and the annuity of the testator's housekeeper. That is to say, the executors had not set aside any part of the estate to meet these annuities.

In these circumstances, the commissioners of inland revenue in England claimed that estate duty became payable in England upon the death of the widow under the Finance Act, 1894, s. 2 (1) (*b*), in respect of the residuary estate of the testator, in so far as it was then represented by English securities. To this claim the executors, the present appellants, put forward two answers. In the first place, they said that the widow had no interest in the specific securities in England, that the only right to which she was entitled at her death was a right to have the residuary estate duly administered, and that, the forum of administration being Northern Ireland, her right was locally situated there. Alternatively, they said that, inasmuch as the estate (other than the real estate in the United States of America) had already borne estate duty in Northern Ireland, they were entitled to the exemption conferred by the Finance Act, 1894, s. 5, in respect of the English securities, save in so far as they represented the proceeds of sale of the real estate in the United States. CLAUSON, J., as he then was, decided against the appellants on both points.

The first of these arguments raises a question of general application, and does not depend in any way upon the statutory provisions in force relating to Northern Ireland. By the Finance Act, 1894, s. 2, it is provided as follows:

> (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (*b*) property in which the deceased . . . had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . . (2) Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof . . .

If, at the death of the widow, in the present case, no part of the testator's estate had consisted of property in Great Britain, estate duty would not have been chargeable on the death of the widow by reason of the provisions of sect. 2 (2). If, on the other hand, the entire estate of the testator had consisted of property in Great Britain, we do not think that it could have been argued that duty was not payable. It has been held—and, in our opinion, rightly held—that an annuitant has an interest in a testator's residuary estate within the meaning of the section: *A.-G.* v. *Watson* (1). If, therefore, the entire residuary estate is situated in the United Kingdom, the exemption granted by subsect. (2) does not come into operation. It is said, however, that this is so, not because the annuitant has an interest in any specific piece of property forming part of the residuary estate, but because, his right being a right to have the entire estate properly administered, he may for that reason be said to have an interest in the entire estate. Proceeding from this, the argument goes on to say that, where part only of the estate is situated in Great Britain, it is not possible to say that the annuitant had an interest in that part, that his interest is an interest in the entirety, consisting of a right to have that entirety administered in the proper forum, which, in the present case, would be Northern Ireland.

In our opinion, this argument is based on too narrow a construction of the word "interest" in the section, and we cannot accept it. The word "interest," like other words in the Act, has a popular, rather than a technical, meaning. Considering the language of the section in this light, and apart from authority, we should have thought that an annuitant has an interest for the purposes of the section, not merely in the entirety of the estate considered as a unit to be administered, but in each part of it. This view is, we think confirmed by the words "to the extent to which a benefit accrues or arises by the cesser of such interest," for the residuary legatees are benefited by the death of the annuitant in respect of each part of the estate which is thereby freed from the burden which lay upon it during the annuitant's life. The argument is really divorced from reality, and, if sound, would lead to curious results, as appears from the following case suggested by Mr. Stamp in his argument for the respondent. A testator domiciled in Canada bequeaths his residuary estate subject to, and charged with, an annuity. If, at the death of the annuitant, the whole estate is situated in Great Britain, estate duty will be payable here. If the whole estate is situated in Northern Ireland, estate duty will be payable there. However, if part is situated in Great Britain and the remainder in Northern Ireland, no estate duty will be payable in either country.

Mr. Radcliffe, for the appellants, relied on a line of authorities in which *In the Goods of Ewing* (2) and *Sudeley* (*Lord*) v. *A.-G.* (3) are typical and familiar examples. In our opinion, however, these authorities have no application to the present question. They were concerned with the local situation to be attributed to property for purposes of probate or probate duty, and the questions which arose were two: (*a*) what was the property which the deceased owned at his death? and (*b*) what, for the purposes of a grant of probate, was its local situation? The property in question being merely a right to have another estate duly administered, it was held that the local situation of the property was in the country of the forum of administration of that other estate. These authorities do not, in our opinion, throw any real light upon the construction of the language with which we are concerned. The problem here is not to discover the locality to be attributed to a right, either as a general proposition or for the purposes of probate. The question which we have to answer is whether or not the deceased annuitant had an interest within the meaning of the Finance Act, 1894, s. 2, in the property situated in the United Kingdom. This question we answer in the affirmative, and in doing so we do not, of course, assert that, for the purposes of the general law, an annuitant has a right to, or an interest in, any particular property forming part of the estate.

Another way of reaching the same result would be to say that the effect of reading subsect. (1) (*b*) and subsect. (2) together is that the annuitant had, for the purposes of the section, an interest in the entirety of the property, save in so far as that property was situate out of the United Kingdom.

The only authority which has caused us any difficulty is *A.-G.* v. *Johnson* (4). The grounds of the decision are not clearly expressed, and the report is difficult to follow, in that arguments of counsel relevant to succession duty are inextricably mixed up with arguments relevant to estate duty. We do not find anything in this case to lead us to doubt the correctness of our view. In our opinion, the decision turned upon the fact that there was a trust for sale which effected a notional conversion of the real estate in Assam, so that the property fell to be treated as personal estate in the hands of the trustees, who were resident here.

The second argument depends upon the true construction and effect of the Government of Ireland Act, 1920, and an order in council made thereunder. By that Act a separate parliament and executive government were set up for Northern Ireland. By sect. 20, an exchequer and consolidated fund of Northern Ireland were established, separate from those of the United Kingdom, and by sect. 21 the proceeds of all taxes which the parliament has power to impose (including death duties) are to be paid into this consolidated fund. Sect. 61 provides that:

> all existing laws . . . in Ireland . . . and all existing taxes in Ireland, shall, except as otherwise provided by this Act, continue as if this Act had not passed, but with the modifications necessary for adapting them to this act. . . .

The adaptations thus contemplated were made by the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, p. 701). By Part I, cl. 2, and Part III, cl. 12, the Death Duties Acts, including the Finance Act, 1894, Part I, and the Acts amending it, are to "have effect subject to the adaptations and modifications set out in" Part III. By Part III, cl. 14, the Death Duties Acts are to apply to deaths on or after the appointed day, subject to certain adaptations, including the substitution of the Minister of Finance for Northern Ireland for the commissioners of inland revenue and the substitution of

"Northern Ireland" for "the United Kingdom" in certain sections of the Finance Act, 1894—notably, sect. 2 (2).

The appellants claim to be entitled to the benefit of the Finance Act, 1894, s. 5 (2), upon the ground that, on the death of the testator, estate duty had been paid in Northern Ireland upon the entirety of his A estate other than the real property in the United States of America. They rely on the definition of "estate duty" in sect. 22 (1) (*c*) as "estate duty under this Act," and say that the estate duty so paid in Northern Ireland was estate duty under the Finance Act, 1894, which continued in force in Northern Ireland after, as it had done before, the appointed B day, subject only to the adaptations to which we have referred.

This argument appears at first sight to be attractive, but we are unable to accept it. In our opinion, the effect of the Government of Ireland Act, 1920, and the order in council made thereunder, was to split estate duty into two duties—the one collected by the Northern Irish Executive on C behalf of the Crown in right of Northern Ireland, the other collected by the United Kingdom Executive on behalf of the Crown in right of the United Kingdom. The proceeds of each tax are paid by the collecting authority into the appropriate exchequer, and are applicable for the services of the country where they are collected. On the occasion of a D death which gives rise to a claim for estate duty in both countries, the property in respect of which the duties are leviable is not necessarily the same, although, as is contemplated by sect. 28 of the Government of Ireland Act, the same property may be liable to duty in both countries. The fact that the duty is still levied under the same Act as kept in force E and adapted does not, in our judgment, make the duties levied in the two countries one duty, and the Act, including the definition clause, must be construed in the light of the new situation brought about by the Government of Ireland Act and the order in council. That this must be the correct view is, we think, confirmed by a consideration of the difficulties F which would arise if the construction put forward by the appellants were accepted. It is necessary to refer to only two of these difficulties. The provisions of the Finance Act, 1894, s. 4, relating to aggregation would be quite unworkable if the estate duty were regarded as one duty. It is manifest that, in a case where duty is payable in both countries on G the same death, the property to be aggregated for the purpose of the duty in the United Kingdom may be different from that to be aggregated for the purpose of the duty in Northern Ireland, with a resulting difference in the rate. Yet this would not be possible if the appellants' contention were sound. A further obvious difficulty would arise under sect. 7 (10), H which provides that estate duty shall not be more than once levied on the same death. We can find no means of reconciling the appellants' argument with this provision, which, if that argument were right, would be in direct contradiction of the Government of Ireland Act and the order in council.

In coming to our conclusion upon this part of the case, we have not been influenced by the fact that the Finance Act, 1936, s. 25, provided that in the case of the death after the passing of that Act of the surviving party to a marriage, the relief claimed by the appellants in this case is to be granted. It was said on behalf of the respondents that this section amounts to a declaration by the legislature that, under the pre-existing law, the relief could not be claimed. We express no opinion upon this point. In the result, the appeal is dismissed with costs.

Appeal dismissed with costs. Leave to appeal.

Solicitors: *Russell & Arnholz* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

ALLEN AND ANOTHER *v.* TREHEARNE (INSPECTOR OF TAXES).

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), **May 4, 5, 1938.]**

Income Tax—Profit from employment—Sum payable on termination of office—Death—Assessment on executors—Income Tax Act, 1918 (c. 40), *All Schedules Rules, r.* 18—*Finance Act,* 1927 (c. 10), *s.* 45 (5), (6).

The managing director of a company was entitled, under an agreement with the company, by way of remuneration for his services, *inter alia,* to a terminal sum of £10,000 to be payable by the company to the managing director or his personal representatives upon the final termination from any cause whatsoever (other than the wilful default of the managing director in the performance of his duties) of his service with the company. The managing director died during the subsistence of the agreement and £10,000 was duly paid to his executors. The executors were assessed to income tax under Sched. E in respect of the sum of £10,000:—

Held: upon the construction of the Finance Act, 1927, s. 45 (5), (6), the assessment was properly made.

Decision of Lawrence, J. ([1937] 2 All E.R. 400) *affirmed.*

[EDITORIAL NOTE. The Finance Act, 1927, s. 45 (5), provides for the cessation of a source of income taxable under Sched. E in the course of the year of assessment. Subsect. (6) provides for the death of the person assessed. It was contended here that for both subsections to be applicable there must be a cessation, followed by death after the lapse of a period of time, and not, as here, cessation caused by the death of the assessee. This contention, however, did not find favour with the court. It was formally submitted that this sum was not income but capital, but this point was not pressed as it was covered by authority in the Court of Appeal.

As to the Finance Act, 1927, s. 45, see HALSBURY, Hailsham Edn., Vol. 17, pp. 219, 220, para. 443; and for the Section of the Act, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 699.]

Cases referred to:

(1) *Drummond* v. *Collins,* [1915] A.C. 1011; 28 Digest 80, *441*; 84 L.J.K.B. 1690; 113 L.T. 665; 6 Tax Cas. 525.

(2) *Whitney* v. *Inland Revenue Comrs.,* [1926] A.C. 37; 28 Digest 105, *649*; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 88; *affg.,* [1924] 2 K.B. 602.

APPEAL from a decision of LAWRENCE, J., given on Mar. 24, 1937, dismissing an appeal from the commissioners for the special purposes of the Income Tax Acts. The facts and the relevant enactments are fully set out in the judgment of SIR WILFRID GREENE, M.R.

Raymond Needham, K.C., and *Terence N. Donovan* for the appellants.

A *The Attorney-General* (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

SIR WILFRID GREENE, M.R.: The appellants are the executors of one Percy Murray, who died on Jan. 17, 1934. At the date of his B death he was in the employment of a company named Lewis Berger & Sons, Ltd., under a service agreement dated Oct. 20, 1931. Under that agreement, he was appointed managing director for a term of 10 years from Aug. 1, 1930. The agreement contained a provision for determination of the agreement by Mr. Murray and by the company C respectively. In the case of Mr. Murray, he was entitled to determine it at any time after July 31, 1935, by giving to the company six months' notice in writing. The salary or remuneration to which he was entitled is divided in the agreement under three heads. All those heads are described as remuneration for his services. The first head is a fixed D yearly salary. The second head is a commission on profits. The third head is described as:

> a terminal sum of £10,000 with an addition thereto at the rate of £800 for each year of service after July 31, 1935, to be payable by the company to the managing director or his personal representatives upon the final termination from any cause whatsoever (other than the wilful default of the managing director in the performance E of his duties) of his service with the company.

That, I think, is all that I need read there.

As I have said, Mr. Murray died on Jan. 17, 1934—that is to say, before he had become entitled to give notice of determination of the agreement. Nevertheless, by virtue of the provision which I have just F read, he became entitled upon his death—that being a termination of the agreement—to the terminal sum of £10,000 therein mentioned. That sum was in fact paid by the company to the appellants as Mr. Murray's executors on July 5, 1934, and an assessment was made upon them in respect of that sum under Sched. E for the year ending Apr. 5, G 1934—that is to say, the financial year within which the death took place, and not the financial year in which the payment was in fact made. No suggestion is made that, assuming the Crown is right in its claim to make an assessment on the executors in respect of this sum, the wrong year has been taken as the year of assessment.

H On those facts, the special commissioners decided that the executors were assessable, and they confirmed the assessment. That decision was affirmed on appeal by LAWRENCE, J., and from his decision the present appeal is brought.

Before examining the provisions of the statutes which affect this matter, it is important to bear in mind what exactly the subject-matter

with which we have to deal is. First of all, it is remuneration for services
performed under an agreement. It is so described in the agreement
itself, and it is by serving under that agreement, and only by serving
under that agreement, that Mr. Murray would become entitled in the
end to receive that terminal payment. All the time that he was serving
he was earning that sum, although the date of payment, of course, did A
not arrive until the determination of the agreement.

The next point to observe is that the sum in question was one the
occasion for payment of which would differ according to events. The
payment might fall to be made during the lifetime of Mr. Murray on
the conclusion of the term of the agreement. It might fall to be paid B
by reason of the agreement coming to an end by notice. It might fall
to be paid by the agreement coming to an end by the death of Mr.
Murray. However, the nature and quality of the payment, speaking
now as a matter of fact, and without reference to anything in the Income
Tax Acts, do not become different, because the occasion on which it C
falls to be made is not the same in every case. It would be just as much
remuneration if it were paid on the occasion of death as it would be if
it were paid on the occasion of determination by notice or by effluxion
of time. In essence, looking at the contract itself, this sum bears the
same quality and character whatever the occasion upon which it becomes D
payable.

That being the nature of the subject-matter looked at apart from the
relevant provisions of the Acts, it is necessary now to consider those
provisions. It is not disputed in this court that a payment of that
character is an income payment in its nature for the purposes of the E
Income Tax Acts, nor is it disputed that a payment of that character
is a payment which falls, so far as its nature is concerned, under Sched. E.

It is submitted on behalf of the appellants as a matter of form in this
court that neither of those propositions is correct, but Mr. Needham
informed us that he was unable to press that proposition before this F
court, because he felt that it was concluded in this court by authority.
We therefore proceed upon the footing that, by its nature, the payment
is an income payment, and a Sched. E subject-matter.

Sched. E provides as follows:

> Tax under Sched. E shall be charged in respect of every public office or employ- G
> ment of profit, and in respect of every annuity, pension, or stipend payable by the
> Crown or out of the public revenue of the United Kingdom, other than annuities
> charged under Sched. C, for every 20*s*. of the annual amount thereof.

Rule 1 provides:

> Tax under this schedule shall be annually charged on every person having or H
> exercising an office or employment of profit mentioned in this schedule, or to whom
> any annuity, pension, or stipend, as described in this schedule, is payable, in respect
> of all salaries, fees, wages, perquisites or profits whatsoever, therefrom for the year
> of assessment . . .

Pausing there for a moment, and considering that language in relation
to a payment of this character, the first question that would arise,

assuming that this is income as we must assume it to be, would be whether or not the payment is one which is properly described as salary therefrom—that is to say, salary from an office or employment had or exercised by a person. There can be no question whatsoever that this sum, if it had been received by Mr. Murray in his lifetime, would have fallen exactly within those words. The sum was one which came from his office or employment in that case. I cannot myself see that any the less in the present case it has come from anything else but his office or employment. That is the source of it. It was that which gave rise to it. It was by performing the services under the agreement that he earned it. If I may interpose the observation here, an expression used by Mr. Needham in the course of his argument was one which I, for one, considered to be not an accurate expression. Mr. Needham referred to the sum on the facts of this case as arising by the death, or coming into existence through the death. As I have ventured to point out, the death was the occasion which made payable a sum that was, so to speak, maturing all the time, and it was not the death which made it payable. It was on the death that it became payable, instead of becoming payable on another event, which would have happened if the death had not occurred.

The method of assessment under Sched. E down to 1927 was by reference to the emoluments of the year of assessment, but, by the Finance Act, 1927, that was altered, and Sched. E was put into the same position as that in which Sched. D had been put—that is to say, the year before the year of assessment was taken as the measure of the profits. The Finance Act, 1927, s. 45, makes provision for that, and in two subsections it makes provisions for the case of a person ceasing to hold an office. It is upon those two subsections—namely, subsect. (5) and subsect. (6)—that the present question immediately turns. Subsect. (5) provides as follows :

> Where in any year of assessment a person ceases to hold an office or employment or to be entitled to an annuity, pension or stipend chargeable under Sched. E, tax shall be charged for that year on the amount of his emoluments for the period beginning on Apr. 6 in that year and ending on the date of the cessation . . .

That is all I need read from that subsection. That subsection contains one or two phrases which require examination. The first word is the word " ceases "—" Where . . . a person ceases to hold an office." That word is quite general. One may cease to hold an office by resigning or by being dismissed or by dying, and I can see no reason whatsoever for excluding from the word " ceases " the meaning " ceases by death." Indeed, that that must be so is, I think, apparent when one observes that two of the subject-matters with which the subsection is dealing, the common Sched. E subject-matters, are annuities and pensions, the normal reason for the cessation of which is, of course, death.

Taking that meaning of the word " ceases," I wish to examine the subsection in reference to the facts of this case, with a view to seeing whether or not the language is applicable to those facts. I will take it phrase by phrase: "Where in any year of assessment a person ceases to hold an office or employment." In the year of assessment 1933-34, Mr. Percy Murray ceased to hold the office of managing director which he held under this agreement, and he so ceased by death. I proceed: "tax shall be charged for that year on the amount of his emoluments for the period beginning on Apr. 6 in that year and ending on the date of the cessation." Looking first of all at the period there defined, the period would be that beginning on Apr. 6, 1933, and ending at his death on Jan. 17, 1934, that being the date of cessation. Is there any subject-matter in this case which answers to the description "the amount of his emoluments for that period"? I should have thought as a matter of English that the £10,000 was properly and accurately described as his emoluments for that period. That it was emoluments paid in respect of the office is unquestionable. If it was not his, whose was it? It was not his executors' emoluments, because they had never held the office. It was someone's emoluments, and it could only have been his. It appears to me that the words "his emoluments" do not involve, as Mr. Needham would have us hold, that, at the very moment when, according to the contract, the emolument became payable, the man must be alive. The first thing to ascertain is: Is there any subject-matter which can be described as his emoluments? The word "emoluments" does not appear, I think, in Sched. E itself or the rules thereunder, but it is defined in the present sect. 45 (10) of the Act of 1927 as follows:

> In this section the expression "emoluments" means all salaries, fees, wages, perquisites or profits or gains whatsoever arising from an office or employment, or the amount of any annuity, pension or stipend, as the case may be.

This, it seems to me, was a salary arising from the office which Mr. Murray held, and it was arising to him in the sense that it was his remuneration according to the contract for the services performed by him under that contract.

My conclusion upon the language of subsect. (5) is that, taking that subsection by itself, and construing it according to its natural construction in relation to the facts of this case, this £10,000 would fall under the language of it as a proper subject-matter of charge. However, the difficulty, of course, arises in that the person holding the office, who is the person to be assessed, is dead, and therefore, in view of the circumstance, among others, that death is one of the occasions on which a person may cease to hold an office, it was necessary to provide for that event.

Before proceeding to an examination of subsect. (6), I would call attention to this circumstance. A person entitled to an annuity or pension who dies during a pension year or annuity year would normally be entitled, either by contract or, where it applies, under the Apportionment Act, to receive in respect of the broken period down to his death an apportioned part of the pension or annuity. It seems to me that in that case the sum which his executors are entitled to receive is a sum which becomes payable by reason of the death, and becomes payable only by reason of the death, in this sense—that, if he had not died, that apportioned sum would never have become payable. I call attention to that only because, annuities and pensions being two of the matters which are particularly provided for, that state of affairs is apparent the moment one begins to consider this subject-matter. If I have followed Mr. Needham's argument correctly, in the case which I have put, the apportioned sum payable on an occasion of that kind would escape taxation. I invited him to suggest any reason for differentiating that case from the present, and no reason which at any rate produced any satisfactory impression on my mind was adduced. Of course, the Income Tax Act has many holes in it, and holes through which the taxpayer succeeds in finding his way, and, if there be a hole there of the nature which Mr. Needham stands for, then, of course, we must recognise its existence. However, the effect of his argument is really, I think, what I ventured to put to him in the course of it, but which he protested was too crude a way of putting it—namely, that a subject-matter of charge has found a hole in the net of assessment, as the deceased person cannot be assessed because he is dead, and the executors cannot be assessed because the case does not come within subsect. (6), which I shall now proceed to examine. Subsect. (6) provides :

> In the case of the death of a person in whose case, if he had not died, tax would, under the provisions of the last preceding subsection, have become chargeable for any year, the tax which would have been so chargeable shall be assessed and charged upon his executors or administrators, and shall be a debt due from and payable out of his estate.

On the face of that subsection there is a phrase of which Mr. Needham has naturally endeavoured to avail himself, because it is a phrase which at once suggests, and suggests not without force, the point which he has raised. It is the phrase : " if he had not died." Mr. Needham says that this £10,000 was never income of Mr. Murray. Although it was of an income character, it was not income of Mr. Murray, because he never could have got it during his lifetime, and, if he had not died, there never would have been any question of chargeability to tax, because the sum would never have become payable at all.

In my opinion, that argument involves construing this subsection in much too narrow a way. The point is really a very short one, and, as I read the subsection, what it is contemplating is this. It is contemplating that there is an obstacle which prevents subsect. (5) from creating an effective charge in respect of emoluments of an office which has *ex hypothesi* ceased, and that obstacle is the fact of the death of the holder of the office. The subsection, on its true construction, appears to me to be directed—at any rate so far as the facts of this case and those of cases like it are concerned—to removing that obstacle and to substituting as the persons to be charged the executors or administrators of the deceased person. Putting that in rather different language, the death is regarded as the thing which prevents the charge from being an effective charge, and the effect of death, as giving rise to a right to the apportioned emoluments, has already been assumed in subsect. (5), because one has come to subsect. (6) only after one has decided that a cessation has taken place. Death, in so far as it operates to produce a cessation, has already performed its function for the purpose of subsect. (5), and, therefore, so far as that is concerned, death is, so to speak, *functus officio.* One then approaches subsect. (6) with the fact of cessation established, and the fact that cessation arose through death is not relevant for the purpose of subsect. (6). When one comes to subsect. (6), the words "if he had not died" are used, and those words are referring, in my judgment, simply to the question of there being a person to be charged in respect of something which *ex hypothesi* has become chargeable under subsect. (5).

I have put in rather more extended language what I understand the judge to have said in more concise language in his judgment. What Lawrence, J., said was this at p. 402:

> In my opinion, under s. 45 (6), the commissioners have to see whether, if the person had not died, tax would have become chargeable under s. 45 (5) in the circumstances which have happened. They are not directed to make any other supposition except that the deceased has not died. For the rest, the facts which have actually happened—namely, that he has ceased to hold office and has received or become entitled to certain emoluments—must be looked to, and the same tax charged upon his executors as would have been charged upon him.

I might perhaps have been better advised if I had contented myself with adopting the admirably concise language of the judge. All I can hope is that, in expressing what I conceive to be the same reasoning in my own language, I have not added any obscurity to the subject-matter. In my opinion, the appeal fails, and must be dismissed.

Scott, L.J.: I agree with Sir Wilfrid Greene, M.R., and I add certain considerations which seem to me important only in view of the argument which has been advanced on behalf of the appellants. Broadly speaking, the ground upon which I think that the appeal should be dismissed is that liability in respect of the emoluments of this office was established by Sched. E, r. 1, and that the rules we have been considering, which are expressed in sect. 45 (5), (6), are rules affecting assessment and collection, and that, if there is any difficulty in the precise applicability in the language of those subsections, it should be interpreted largely and generously, in order not to defeat the main object of liability laid down by Sched. E, r. 1.

The principle applicable is that enunciated by Lord Parker of Waddington in *Drummond* v. *Collins* (1), and the passage in question cited by the Attorney-General is at p. 540:

> This section is a collecting section and not a taxing section, and there is no reason in principle why it should not receive a liberal interpretation.

In a later case, *Whitney* v. *Inland Revenue Comrs.* (2), Lord Dunedin said, at p. 110:

> My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless A crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.

B Under Sched. E, r. 1, it is laid down:

> Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule, or to whom any annuity, pension, or stipend, as described in this schedule, is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year C of assessment . . .

Sir Wilfrid Greene, M.R., drew attention to these words, which are of extreme importance in considering this question of liability to tax under Sched. E. As I read it, it is the intention of the legislature to exact tax under Sched. E. in respect of all profits whatsoever that come D from the office.

Having regard to the agreement in this case, there can, it seems to me, be no question whatever that this £10,000 fee was essentially a profit or emolument from the office of managing director. The only question is whether the death of Mr. Murray prevented the Revenue from obtaining E the tax which, in my view, it was intended should be obtained by reason of the provision of Sched. E, r. 1. Sched. E, r. 2, which deals with the case of death, was repealed by sect. 45 (9) of the Act of 1927, and therefore we need not consider that. Rule 18 is not strictly applicable here, because that rule applies only to profits which have arisen or accrued to the F taxpayer before his death. The subsections which are applicable are therefore only those two to which Sir Wilfrid Greene, M.R., has referred—namely, sect. 45 (5), (6), of the Act of 1927.

I entirely agree with the construction put by Sir Wilfrid Greene, M.R., upon the provision in subsect. (5) that "tax shall be G charged for that year on the amount of his emoluments for the period" down to the date of cessation. It is quite true that, strictly speaking, the emolument in question never became his in the sense that the quantitative amount of £10,000 became his property. It never became payable to him, because he died. However, that it was his emolument H under the agreement with the company in a broad sense seems to me to be obvious, and, in order to prevent the Revenue's failure to get the tax which was intended by Sched. E, r. 1, it appears to me to be legitimate to treat those words as amounting to these—namely, "on the amount of the emoluments attaching to the office which he held." If that is the right interpretation of them, then I see no difficulty in applying subsect. (6) for the purpose of collection. The only object of subsect. (6) is to prevent the failure of the Revenue through inability to collect the tax. Provision that it should be exigible from the executors or administrators is, to my mind, merely a provision concerning collection which we ought to treat as reasonably expressed to deal with such a case as has arisen here, which falls, in my view, within the words of subsect. (5).

I confess that during the argument of the case I have had some doubt, but, having regard to the fact that the intention to impose liability is clear in this case by reason of the wording of Sched. E, r. 1, in my view we ought to have no hesitation in giving what I may call a common-sense interpretation to the machinery rules, sect. 45 (5), (6), of the Act of 1927. I therefore agree with the judgment which has been given by SIR WILFRID GREENE, M.R.

CLAUSON, L.J.: I agree with the judgments delivered by SIR WILFRID GREENE, M.R., and SCOTT, L.J. I will venture to add only that statutory provisions have been in existence since 1842, and are now represented by sect. 161 of the Act of 1918, which seem to make it clear that the scheme of the income tax legislation involves that, if a person chargeable to tax dies, his executor or administrator is normally liable for the tax charged on the deceased person. The construction which we are giving to sect. 45 of the Act of 1927 at all events has the merit of satisfactorily fitting that section into the general scheme of the income tax legislation.

Appeal dismissed with costs.

Solicitors: *Windybank, Samuell & Lawrence* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

REARDON SMITH LINES, LTD. *v.* BLACK SEA & BALTIC GENERAL INSURANCE CO., LTD. THE INDIAN CITY.

[COURT OF APPEAL (Greer, Slesser and Clauson, L.JJ.), **March 10, 11, 14, 15, 16, April 12, 1938.**]

Insurance—Marine insurance—Shipping—Claim for general average—Charterparty—Ship proceeding from Poti to Istanbul—Voyage via Constantza—Deviation—Whether evidence of trade custom admissible—Absence of ambiguity in terms of charterparty.

A vessel was chartered "to proceed . . . to Poti and there load and being so loaded with all convenient speed proceed to Istanbul and thence to a trans-Atlantic port to be named." Owing to facilities for obtaining oil cheaply at Constantza, the voyage to Istanbul was made *via* that port. While entering that port, the vessel was stranded, and a part of the cargo had to be jettisoned. Evidence was given that about a quarter of the oil-burning vessels proceeding from Black Sea ports to the Bosphorus bunkered at Constantza:—

HELD (GREER, L.J., dissenting): (i) the words of the charterparty were unambiguous, and provided for a direct route to be taken.

Evidence as to a trade custom of calling at Constantza was, therefore, inadmissible.

(ii) this constituted a deviation from the direct sea route, and the underwriters were, therefore, not liable to pay general average contribution.

[**EDITORIAL NOTE.** However wide the language used in the clause of the charterparty dealing with deviation, it cannot confer a power of visiting ports out of the course of the voyage as contemplated by the parties at the time of the contract. In the present case, therefore, once the court had decided that Constantza was not a port of call within the terms of the contract, a call there for the purpose of securing cheaper bunkers was a voluntary departure from the insured voyage, and therefore a deviation.

As to Deviations, see HALSBURY, Hailsham Edn., Vol. 18, pp. 257-260, paras. 351, 352 ; and for Cases, see DIGEST, Vol. 29, pp. 145-152, Nos. 975-1052.]

Cases referred to :

(1) *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1902), 18 T.L.R. 374 ; 41 Digest 486, *3175*.

(2) *Frenkel* v. *MacAndrews & Co., Ltd.* (1928), 139 L.T. 327 ; 41 Digest 486, *3177* ; *affd.*, [1929] A.C. 545 ; 98 L.J.K.B. 389 ; 141 L.T. 33.

(3) *Leduc* v. *Ward* (1888), 20 Q.B.D. 475 ; 41 Digest 485, *3172* ; 57 L.J.Q.B. 379 ; 58 L.T. 908.

(4) *Glynn* v. *Margetson & Co.*, [1893] A.C. 351 ; 41 Digest 311, *1715* ; 62 L.J.Q.B. 466 ; 69 L.T. 1 ; *affg.* S.C., [1892] 1 Q.B. 337.

(5) *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61 ; 17 Digest 266, *786* ; 26 L.J.Ch. 473 ; 29 L.T.O.S. 67 ; *affg.* S.C. *sub nom. Pearson* v. *Rutter* (1853), 3 De G. M. & G. 398.

(6) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38 ; 41 Digest 517, *3471* ; 50 L.J.Ch. 411 ; 44 L.T. 381 ; *affg.* S.C. *sub nom. Nelson* v. *Dahl* (1879), 12 Ch. D. 568.

(7) *Malmberg* v. *Evans (H. J.) & Co.* (1924), 41 T.L.R. 38 ; 29 Digest 64, *237*.

(8) *Brown* v. *Byrne* (1854), 3 E. & B. 703 ; 41 Digest 611, *4388* ; 23 L.J.Q.B. 313 ; 23 L.T.O.S. 154.

(9) *Smith* v. *Jeffryes* (1846), 15 M. & W. 561 ; 17 Digest 311, *1223* ; 15 L.J. Ex. 325 ; 7 L.T.O.S. 231.

(10) *Robertson* v. *French* (1803), 4 East, 130 ; 17 Digest 248, *626*.

(11) *White* v. *Granada S.S. Co., Ltd.* (1896), 13 T.L.R. 1 ; 41 Digest 486, *3174*.

(12) *Re Sutro (L.) & Co. & Heilbut, Symons & Co.*, [1917] 2 K.B. 348 ; 17 Digest 48, *538* ; 86 L.J.K.B. 1226 ; 116 L.T. 545.

(13) *Morrison (James) & Co., Ltd.* v. *Shaw, Savill & Albion Co., Ltd.*, [1916] 2 K.B. 783 ; 41 Digest 486, *3176* ; 86 L.J.K.B. 97 ; 115 L.T. 508.

(14) *United States Shipping Board* v. *Bunge y Born Limitada Sociedad* (1925), 134 L.T. 303 ; 41 Digest 486, *3179*.

(15) *The Dunbeth*, [1897] P. 133 ; 41 Digest 489, *3191* ; 66 L.J.P. 66 ; 76 L.T. 658.

(16) *West Aleta*, [1925] Am. Mar. Cas. 1427.

(17) *A/S Rendal* v. *Arcos, Ltd.*, [1937] 3 All E.R. 577 ; Digest Supp. ; 106 L.J.K.B. 756 ; 157 L.T. 485.

(18) *Grace* v. *Toyo Kisen Kabushiki Kaisha* (1925), 7 Fed. Rep. 2nd Series 889.

Appeal by the defendants from a decision of Goddard, J., dated Mar. 22, 1938. The facts of the case are fully set out in the judgments.

G. St.C. Pilcher, K.C., *H. G. Willmer* and *N. V. Craig* for the appellants.

A. T. Miller, K.C., and *C. T. Miller* for the respondents.

Pilcher, K.C. : The evidence admitted in this case was inadmissible : *White* v. *Granada S.S. Co., Ltd.* (11). The only other cases in which it was sought to introduce evidence of custom were *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1) and *Frenkel* v. *MacAndrews & Co., Ltd.* (2), where it was admitted that the word " route " was ambiguous, and *Re Sutro* (*L.*) *& Co.* v. *Heilbut, Symons & Co.* (12). The cases of *Leduc* v. *Ward* (3) and *Glynn* v. *Margetson & Co.* (4) were decided on deviation clauses. The dominating factor is the voyage, and it is necessary to construe the deviation clause in relation to that voyage. [Counsel referred to *Morrison* (*James*) *& Co., Ltd.* v. *Shaw, Savill & Albion Co., Ltd.* (13), *United States Shipping Board* v. *Bunge y Born Limitada Sociedad* (14), *The Dunbeth* (15).] No evidence as to the usual route is allowable here. The contract is clear, and there is no room for speculation. [Counsel referred to *West Alita* (16), Arnould on Marine Insurance, 11th Edn., Vol. 1, s. 390, at p. 549, and Carver on Carriage by Sea, s. 285, p. 432.]

Miller, K.C.: These authorities were considered by the judge, and he rejected the argument. The ship was on a route which was invariably taken during the last 3½ years by all the plaintiffs' ships, and which was registered as a normal route for an oil-burning ship. To call at Constantza for bunkers was a normal proceeding, and an agreed voyage in the terms of this charterparty permitted a call there. Alternatively, such a call is within the liberty clause. No proposition laid down in *Leduc* v. *Ward* (3) or *Glynn* v. *Margetson & Co.* (4) can affect this case, as in those cases the facts were far narrower. In *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1) and *Frenkel* v. *MacAndrews & Co., Ltd.* (2), one finds a new rule growing up, which limits the application of the earlier cases. The court should follow these two later cases. This is not a bill of lading case, and it is wrong to apply to a charterparty case principles laid down in a bill of lading case. There is no described voyage here, but there were alternative routes. The ship could go by Constantza. Where the evidence shows two possible routes, and the ship was on one of them, then she is within the contract. The words " with all convenient speed " have never been construed. [Counsel referred to *A/S Rendal* v. *Arcos, Ltd.* (17), *Grace* v. *Toyo Kisen Kabushiki Kaisha* (18), *Re Sutro* (*L.*) *& Co. & Heilbut, Symons & Co.* (12) and *Morrison* (*James*) *& Co., Ltd.* v. *Shaw, Savill & Albion Co., Ltd.* (13).]

Willmer, in reply: *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1), in which evidence was admitted, was a very special case, as also was *Frenkel's* case (2), where a document was ambiguous. Evidence may also possibly be admitted in cases where there is a regular line of ships running to a schedule, as in *Morrison* (*James*) *& Co., Ltd.* v. *Shaw, Savill & Albion Co., Ltd.* (13). However, in cases such as this, and in *Leduc* v. *Ward* (3), where the definition of the voyage is precise, evidence is not admissible.

Greer, L.J. [read by Clauson, L.J.]: The plaintiffs are the owners of a regular line of tramp steamships which go, amongst other places, to

Black Sea ports. There are various ports in the Black Sea from which shipments are made and to which the plaintiffs have been in the habit of sending their ships, but the ports most material for consideration in the present appeal are the ports of Poti, Novorossiisk and Eupatoria. Vessels sailing from these ports, to use a neutral word for the present, frequently during the years 1930 to 1933 called at Constantza, on the eastern side of the Black Sea, if they were oil-burners, to take in oil in bunkers at a place where the supply was abundant and cheap. Vessels from Odessa, Nicolaieff, and other ports at the northern end of the Black Sea also frequently called, when they wanted oil, at Constantza. If a bill of lading contract or a charterparty contract described the voyage from any of these ports as a voyage from a port of loading to a port of discharge beyond the Black Sea, then, in ordinary circumstances, none of those ships could have called at Constantza without being liable to have it said of that ship that it was deviating from the voyage. The extent of the deviation would differ according to the port of loading, but in every case there would be some deviation from the geographical route. On Sept. 1, 1933, the plaintiffs, who were the shipowners, agreed to charter their vessel to Messrs. Manganexport of Berlin. Manganexport was a company controlled by the Soviet government through some one or other of the companies they had created in Russia. The charterparty was to be valid for three steamers, the first from Oct. 1 to Oct. 18, or, at the charterers' option, to Oct. 20, the second from Nov. 1 to Nov. 15, and the third from Dec. 1 to Dec. 15. The owners were to nominate the steamer for each month at least 20 days before the lay days commenced, and were to declare the exact position of the steamer when nominated. The charter also provided that the owners were not to be called upon to take bunkers from charterers, as their vessels would be burning oil. The charter further provided that the steamer was to be addressed for custom house business to charterers or their agent at ports of loading or discharge on usual terms. The charter contained the usual exceptions as to the liability of the steamer, and provided that the steamer should be at liberty to call at any port or ports in any order or places to bunker or receive and /or deliver part cargo and /or passengers, or to deviate for the purpose of saving life or property. It also provided, in cl. 28, that at Nicolaieff or Poti the steamer was to be consigned to the Odessa freight office or their agents, telegraphic address "Sovflot Nicolaieff" or "Sovflot Poti," for loading and custom house business. When the vessels sailed under the charter, they did not know what their loading port would be until they called at Istanbul, when the charterers, through their agents, nominated the loading port. A great quantity of evidence was called to show that it was the regular habit during the three-and-a-quarter years prior to the disastrous voyage which this court has to investigate—and that very many ships had adopted the practice—to call at Constantza for oil, though that port was not on the geographical line from the port of loading to the port of discharge, and that 25 per cent. of all ships loading cargo at Black Sea ports and burning oil had called at Constantza, and, though it is clear to demonstration that this course of business must have been well-known to all firms and companies interested in the Black Sea trade, no objection was ever taken by shippers or charterers to the vessels calling at Constantza. Unfortunately, the last of the three vessels, the Indian City, which sailed under the charterparty in question, went ashore at Constantza, and suffered very considerable damage, and, owing to some of the charterers' cargo being sacrificed for the benefit of all the interests concerned, a claim for general average arose by the charterers against the ship and all other interests concerned. The amount of that claim was rather more than £6,000. The plaintiffs, in the event of their being successful in their action for the general average claim, were admittedly also entitled to a sum of £1,061 14*s*. 4*d*., which had been paid into Barclays Bank in joint names. The right of the plaintiffs to the last-mentioned sum admittedly depended upon the result of their claim for general average. Both of these claims depend upon the question whether or not, when the ship went ashore at Constantza, she was deviating from her contractual voyage.

As between the charterers and the shipowners, the bill of lading was only a receipt for the goods, as the bill of lading had never been assigned by the charterers at the time when the vessel went ashore. The usual Lloyd's average bond was signed by the shipowners and the charterers. The shipowners, through their captain, were ready to give up their lien for general average on receiving a guarantee by the defendants, and such guarantee was given on Jan. 15, 1934. It seems to me that the effect of the guarantee was merely to allow the guarantors to stand in the shoes of the interests concerned, and it seems to me that, if, at the date of the guarantee, the charterers were under a liability to the shipowners, the defendants would have to make good that liability. It was contended, however, that the charterers were under no liability to the shipowners, because the ship had deviated from her contract voyage. Whether or not she had so deviated depends partly upon the evidence and partly upon the law as laid down in a number of cases. There is no room for dispute with reference to the facts proved. Mr. Pilcher, for the appellants, made certain calculations based upon the evidence given by affidavit and on commission with regard to the number of vessels that did call at Constantza, and I think that he was right in saying that 75 per cent. of the oil-burning vessels went direct to the Sea of Marmora, without calling at Constantza, but that 25 per cent., or a quarter of the total, called at Constantza, and took oil bunkers there during the three-and-a-quarter years preceding the unfortunate stranding of the Indian City.

It was contended by Mr. A. T. Miller, on behalf of the respondents, that the evidence showed that all oil-burning vessels leaving Black Sea ports had, by reason of a long-standing practice, alternative routes which they might take, one direct without calling at Constantza and the other indirect by calling at Constantza. The diversion from their direct route was much more serious in the case of vessels loading at Poti, vessels loading at Novorossiisk, and vessels loading at Eupatoria, than it was in the case of vessels loading at such ports as Odessa, and the neighbourhood thereof. There was, however, it seems to me, overwhelming evidence that it must have been well-known to everybody connected with the Black Sea trade that oil-burning vessels, when they desired to do so, in practice sometimes went direct and sometimes selected the route which, unless justified by the commercial practice, would have been a deviation, involving, as it did, a call at Constantza, which was not on the direct geographical route to the port of discharge.

The question arising in the appeal is whether or not the judge was right in his conclusion that the vessel, in proceeding to Constantza to take in oil bunkers, did not deviate from her voyage. He says, at p. 3 of the transcript of his judgment:

> The plaintiffs had for some time been running a fleet of chartered steamers to the Black Sea. They were all ships capable of burning either coal or oil. It was not until 1930 that they sent ships in any number to the Black Sea, and they did so because in that year they found that cheap oil was available at Constantza for bunkering purposes. It was then that they began to do business with the Russian charterers, and the practice was for their ships, on leaving the loading ports, which might be Nicolaieff, Novorossiisk, or Poti, to proceed first to Constantza, and there bunker, and thence continue the ocean voyage. So far as these ports are concerned, there is no doubt that Constantza was off the direct route to the Bosphorus.

At p. 4, the judge says:

> Now at this time [when the Indian City sailed from Poti, where she loaded], not only the plaintiffs' ships, but oil-burners belonging to other owners were in the habit of bunkering at Constantza. This is not surprising as there was a large supply of cheap oil available there.

So far as the plaintiffs' ships are concerned, all but one of those which sailed from Poti bunkered at Constantza, and the judge says that he came to the conclusion that it was proved that it had become a regular practice by the autumn of 1933 for oil-burning ships leaving the eastern ports to bunker at Constantza. In another part of his judgment, he refers to the majority of the ships that sailed from Black Sea ports as sailing to Constantza, but this was a slip, as it was only one-quarter of the ships that did so call. He states his conclusion that he accepts the plaintiffs' case as showing that the Indian City was proceeding by a recognised or accustomed route, which included a call at Constantza, and that there was, therefore, no deviation. Then he refers to the route *via* Constantza as a recognised trade route, which need not necessarily be the shortest sea-track. The judge relied upon the law laid down in *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1), as approved by the House of Lords in the decision in *Frenkel* v. *MacAndrews & Co., Ltd.* (2), as showing that there may be, in a business sense, alternative routes which are practicable, and that either alternative route may be used by a ship without incurring liability to the penalties of deviation. I think that the judge approached the question in the right way by asking himself, before considering the liberties in the charterparty, whether or not the route taken *via* Constantza was an ordinary trade route in a business sense. If it was, it was unnecessary then to consider whether the route so taken was within the liberties granted by the contract of affreightment. I have come to the conclusion that the judge was right in holding that, when she grounded, the Indian City was on a route generally recognised in the Black Sea trade as an alternative route to the direct route, and, accordingly, that the defendants were liable as standing in the shoes of the charterers. I find it impossible to suppose that the Soviet agents in the various ports, who looked after the interests of the charterers, knew nothing about this practice, or that they failed to communicate to their principal the fact that the various ships were in the habit of calling at Constantza.

It remains for me to consider the various authorities relied upon on either side. The two most authoritative decisions on the question as to what effect is to be given to a bill of lading which describes a carrying voyage as from port of loading to port of discharge, followed by a clause containing liberty to call at any port and in any order, are the decisions of the Court of Appeal in *Leduc* v. *Ward* (3) and that of the House of Lords in *Glynn* v. *Margetson & Co.* (4). In both these cases it was held that, in the absence of any evidence which would show that commercially the vessels of the line in question were in the habit of calling at certain ports, the description of the voyage must be held to have a geographical meaning—namely, that the vessel is bound to go direct from the port of loading to the port of discharge—and that, where liberty to call at any ports in any order is reserved to the ship in the bill of lading, that means any ports which are, in a business sense, so near to the geographical line as to prevent calling at these ports from being deemed a diversion. The headnote of *Leduc* v. *Ward* (3) is as follows:

> The plaintiffs having purchased goods to be shipped from a foreign port on the terms that payment of the price was to be made in exchange for shipping documents, the bill of lading signed upon the shipment of the goods was, upon payment of the price, indorsed to them. The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any ports in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, and was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. In an action brought by the plaintiffs against the shipowners for non-delivery of the goods, evidence was given to show that the shippers of the goods, at the time when the bill of lading was given, knew that the vessel was intended to proceed *via* Glasgow: Held, that such evidence was not admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such voyage; that Glasgow, being altogether out of the course of such voyage, was not such a port; and that the vessel was therefore lost while deviating from the voyage contracted for, and the excepted perils clause did not exonerate the defendants from liability in respect of non-delivery of the goods.

Glynn v. *Margetson & Co.* (4) was to the same effect, but it has the higher authority consequent upon being a decision of the House of Lords. It is, however, worth while noting that, in a book of high authority, ARNOULD

ON MARINE INSURANCE, 11th Edn., s. 60, at p. 85, the law is stated as follows:

> In the same way it is a general usage of maritime trade, incorporated as we have seen into all policies, that the ship, in the absence of any express permission on the face of the policy to do otherwise, shall pursue a direct course between the two termini of the voyage, without stopping at any intermediate places; if, however, A it be the notorious and well-settled usage of any given trade to stop at certain interjacent ports, this usage of the particular trade would doubtless countervail the general maritime usage, and the stopping at such ports, although not authorised by any express clause in the policy, be deemed no deviation.

The question as to whether or not a departure from the direct route, supported by a general practice of the line on which the goods were B shipped, was a deviation arose in a case tried in Liverpool before WILLS, J.—namely, *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1). That was a case like *Glynn* v. *Margetson & Co.* (4) in its facts, but different from *Glynn* v. *Margetson & Co.* (4) by reason of the evidence that was given that the Cunard Line had two usual routes. About 50 per cent. C of their vessels that shipped goods at Bari went direct from there to the port of destination, but the other 50 per cent. went by a roundabout route through the Mediterranean, calling at other ports before setting steam direct for Liverpool. The case was a case which fell to be determined as between the indorsee of a bill of lading on the terms of the D bill of lading, the bill of lading holder being in the same position as that in which he was in *Glynn* v. *Margetson & Co.* (4), not being bound by the knowledge and assent of the shippers. In distinguishing *Glynn* v. *Margetson & Co.* (4), WILLS, J., said, at p. 375:

> E . . . . there was no evidence as there is in this case that the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route *via* the Adriatic round by Levantine or Black Sea ports, but, if that is the only voyage practicable, that must be the voyage in the business sense agreed upon.

It is to be observed that the judge's description of the indirect voyage as the only practicable way is inaccurate, because it seems to mean the F only practicable way as understood by the shipper, and the bill of lading holder was not bound by what was known to the shipper as the only practicable way in which goods could be shipped on a particular boat on which they were put. I think that the decision must be taken to be a decision that, if the way the vessel in fact sailed was one of the practicable G ways in which the bill of lading contract could be performed, then it was open to the defendants to contend that there were two routes, one direct and the other a route well-known in the fruit trade in the Mediterranean as a route which might be taken by any vessel shipping goods at Bari. Understood in this sense, it seems to me to agree with the proposition H that I have stated from ARNOULD ON MARINE INSURANCE, and with what the Court of Appeal decided in *Frenkel's* case (2). It is plain to me that each member of the Court of Appeal decided that case upon the assumption that Malaga was the port of loading and Liverpool the port of discharge, and not on the alternative view that there was no port of loading mentioned in the bill of lading. In the course of his judgment in that case, which was an action by the original shipper, as it is in the present case, Scrutton, L.J., said, at p. 329:

> This case is a case where the shipper, at the time he puts goods on board, knows that he is shipping by a line which from Malaga may have two ordinary routes. He may be shipping on a vessel of the line which is going to England "*via* Levante," or he may be shipping on a vessel of the line which is going from Malaga direct, and he is told before he ships, by advertisements and by shipping cards left at his office, that the vessel is going "*via* Levante." That appears to me to be the simple case of a vessel with a bill of lading destination London going by the ordinary routes by which that line goes to London, and going when the shipper has been told before he ships that she is going by that one of the ordinary routes.

It is, I think, if I may humbly say so, put more clearly by myself in my judgment, and even more clearly by Sankey, L.J., in his judgment. At p. 330, I say:

> Now the material facts appear to me to be these: That for a considerable time—some years—the defendants have been pursuing from Malaga to Liverpool or other ports of this country, or to Hamburg, two distinct routes for the vessels of their line—one "*via* Levante," which means going north-east up the coast of Spain, calling at various ports, and then coming back from the furthermost port down the Mediterranean and through the Straits to this country, and the other coming direct from Malaga after they have been up to the higher ports, direct from Malaga to ports in this country.

Later on I say, at p. 330:

> We have not got to consider the effect of the deviation clause until we have found out, first, what the route was. Then you may have to ask yourself the question as to whether from that agreed route there was a deviation.

Giving his judgment, Sankey, L.J., after referring to the pleadings, says, at pp. 330, 331:

> In this case there was abundant evidence that the vessel proceeding in a northerly direction towards Cartagena was proceeding upon one of the usual routes. . . . So on the first point there was really evidence all one way with regard to the route taken by the vessel being one of the usual routes, and therefore, in my view, she was proceeding upon the agreed voyage.

Later on, he says, at p. 331:

> Therefore, there was evidence that it was the usual route, or a usual route, and that the plaintiff well knew it.

It does not seem to me to matter whether or not the plaintiff knew it if it was in fact a usual route, because, once it is established that it is a usual route, it is unnecessary to go further and to decide whether or not the charterer or shipper knew it. In *Frenkel's* case (2), in the House of Lords, their Lordships dealt with two questions. Most of their Lordships thought that the plaintiff's appeal failed because there was no description in the bill of lading or the charterparty of the commencement of the chartered voyage, and they also dealt with the question with which the Court of Appeal alone had dealt—namely, that it had been established that the route "*via* Levante" was a usual commercial route for the ship to follow. In the course of his opinion, Lord Buckmaster refers to the two well-known routes, and says, at p. 550:

> The customary route is one of two routes, and the figures showed, as to the different voyages, that the one was nearly as customary as the other.

In the course of his opinion, Viscount Dunedin said, at p. 557:

> There may be, in my view, either alternative routes or a customary route which in either case might displace the geographical route.

He cites with approval the words of WILLS, J., in *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1), who, in distinguishing *Glynn* v. *Margetson & Co.* (4) from *Frenkel's* case (2), pointed out that there was no evidence, as in *Frenkel's* case (2), that the only practicable way to get a cargo from Bari to Liverpool was by Levantine or Black Sea ports. As I have
A pointed out, the words should have been that there are two practicable ways, in a business sense, of getting the cargo from Bari to Liverpool, one direct and the other *via* Levantine or Black Sea ports. VISCOUNT SUMNER points out that the voyage *via* Levante was shown to be a usual commercial route for the Cervantes to follow in the circumstances,
B and he says, at p. 561 :

> I cannot see that it is the less a reasonable and usual commercial route, though the evidence referred only to the ships of the respondents' own line. Their prominent position in this trade, the number of ships they run, and the length of time that this kind of practice has been followed by them all go to prove this conclusion.

C VISCOUNT SUMNER also makes some valuable observations with regard to the modification of strict documents by alterations in the practice of merchants and steamship owners. In referring to *Glynn* v. *Margetson & Co.* (4), VISCOUNT SUMNER says, at p. 563 :

> D LORD ESHER, M.R., mentions various circumstances as to season and safety that may be material. It would have been enough for the decision to have said "Malaga to Liverpool is not Malaga to Burriana and back to Liverpool." The mention of other matters, all of them depending on facts relating to the circumstances of trade and navigation and varying somewhat as time goes on and progress takes place, really shows how clearly these great authorities desired to guard themselves in view of the fact, that on many grounds deviation from the sea-track might still not be beyond the ordinary route, though in the case in hand they had not been put in
> E evidence. Such things must be matters of degree and may not always be equally important for all classes of ships, all kinds of cargo, or all periods of trade.

VISCOUNT SUMNER then refers with approval to the decision of WILLS, J., in *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1). LORD WARRINGTON OF CLYFFE treats the case as one of ambiguity consisting of a latent
F defect which appeared only when the evidence was given. That is to say, he treats the case as one in which the description is a description of a voyage from Malaga to Liverpool, and the evidence showed that there were two routes to which that description might be applied, one direct and the other a recognised commercial route going many hundreds of
G miles further than the direct route, and, in explaining *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1), he explains that what is meant by "practicable" is "clearly practicable in a commercial sense."

The evidence in the present case showed that all the plaintiffs' oil-burning vessels, except one starting from Poti, went direct to Constantza,
H took in their oil there, and then went on to the Sea of Marmora. This took them about a day's steaming beyond what they would have taken if they had gone direct to the Sea of Marmora, but, on the other hand, by having on board only a sufficient quantity of oil to take them to Constantza, and when at Constantza taking only sufficient oil to take them to Constantinople, they were leaving room in their vessels for

more cargo to be put in their ships at Poti, though, in the particular instance of the sailing of the Indian City, this point may have been immaterial, as there appears to have been plenty of room for more cargo without trespassing on the space reserved for bunkers. The plaintiffs put in evidence before Goddard, J., a number of affidavits by captains employed in various ships of different nations which satisfy me that everyone engaged in the trade knew perfectly well that from Poti, from Novorossisk, from Eupatoria, and from the Northern ports, including Odessa, there had been established as a usual commercial route a voyage, first to Constantza, with a rest there to take in oil, and then a resumption of the voyage to the Sea of Marmora, and that this was a well-recognised, usual route for vessels to take during the material years, as to which evidence was called, in their voyage from Black Sea ports to Constantinople and ports beyond.

To prove a commercial or business practice showing an alternative recognised route, it is not necessary to show that the alternative route was taken by a majority of steamers leaving the port of loading. It is sufficient if it be taken by a substantial percentage of the voyages from the loading port. The decisions of the court in *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1) and *Frenkel's* case (2) did not turn on the fact that the practice had been followed in so large a percentage as 50 per cent. In my judgment, the practice, to be binding, may be proved by a percentage less than that of 50 per cent., and I can well conceive that a practice followed by only 25 per cent. may be more convincing than one followed by 50 per cent. of ships of one line. In the present case, according to the affidavits relied on by the respondents, the 25 per cent. consisted of ships of a variety of ownership and nationality, and it must have become well-known, not merely to shipowners, but also to the charterers and shippers' agents who represented the German company and the Soviet in all the ports in the Black Sea. It is, to my mind, more convincing than it would have been if it had been established as the practice of 50 per cent. of the ships of one line only. I feel that it is indisputable that the destination of these ships *via* Constantza must have been known to all who were interested in the Black Sea trade, and it is to me unbelievable that the charterers did not from time to time receive from their agents information about the alternative route that was being followed by so many ships belonging to so many owners of different nationalities. The defendants as guarantors can stand in no better position than that of the charterers, who still were the only contracting parties at the date of the guarantee. In any event, without considering any question of estoppel, the alternative route, if established by evidence, would be one that any ship could follow without having to rely on any special liberty reserved by a contract of affreightment. It would not be a deviation, and would never require justification by a special liberty clause. Such a clause is required only in respect of a route which has not been established as a usual commercial route. In these circumstances, I think that the effect of the cases is that we need not deal with the question as to the meaning of the liberty clause in the charterparty, or with the question of estoppel which was raised by Mr. Miller.

It was suggested in the course of the argument that no weight should be attached to the evidence contained in the affidavits, as the deponents did not, except in one case, attach copies of the contracts of affreightment, so as to show that there was no special term therein giving express liberty for the particular ship to call at Constantza. In my judgment, no weight should be attached to this argument. A long acquaintance with charterparties and bills of lading with regard to shipments from all Continental ports satisfies me that there is a high degree of probability that in all the cases mentioned in the affidavits the liberty to call at ports was in the usual form in which we find it in the defendants' charterparty. Further, I think we are bound to treat the deponents as honest men, and, if, when they swore their affidavits, they knew that there was a special clause in their contract of affreightment expressly entitling the ship to call at Constantza, they would have been guilty of that form of dishonesty known as *suppressio veri*. I do not believe they were so guilty, nor do I think that, if there were such a clause in a charterparty which the deponents had not seen, their owners would have failed to inform their captains of the existence of such a liberty.

It was contended by Mr. Willmer, in his reply, that the evidence contained in the affidavits was not admissible, inasmuch as it was inconsistent with the meaning of the words contained in the charterparty. I think that it is too late to apply the doctrine of *Leduc* v. *Ward* (3) to a case like the present. If the evidence be inadmissible in the present case, it would have been inadmissible in *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1) and in *Frenkel's* case (2). In *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1) it was admitted and given effect to by Wills, J., and his decision was approved in the opinions of the Lords in *Frenkel's* case (2). If the contention is right, the decision of the Court of Appeal in *Frenkel's* case (2) was wrong, as they decided the case entirely upon evidence which is said to be inadmissible, and it is quite clear that they treated the case as one in which the *terminus a quo* and the *terminus ad quem* were both mentioned. One of the reasons for the decision of the House of Lords was that the *terminus a quo* was not mentioned, but they also, as I have pointed out, treated the case as one in which they would have to come to the same decision if the *terminus a quo* had been mentioned. Lord Warrington of Clyffe, held that, although there was no ambiguity in the words themselves, there was a latent ambiguity, which arose out of the evidence that 50 per cent. of the respondents' ships went one way and 50 per cent. the other way, and that this ambiguity was a matter to be determined by evidence as to what the parties really meant. I think that this argument should not succeed, notwithstanding the view that will be expressed to the contrary by my brethren. I think that the judge was right, for the reasons he gave, and that this appeal should be dismissed with costs.

Slesser, L.J.: The facts of this case have been fully stated by Greer, L.J. The voyage in question in this case is defined in a charterparty between the plaintiffs and the cargo owners dated Sept. 1, 1933, which is incorporated in a bill of lading of Dec. 31, 1933. The charterparty provides in cl. 2 that the ship shall proceed with all convenient speed to Nicolaieff or Poti, as ordered under cl. 39, which provides that orders for port of loading shall be given at Istanbul within six working hours from handing in by the captain of notice of arrival at Istanbul—in fact, Poti was ordered—and there load a cargo of iron ore, and, being so loaded, shall with all convenient speed proceed to various named American ports at charterer's option, orders unless previously given to be declared on steamer passing Gibraltar. Sparrow's Point in the United States of America was ordered. The voyage, therefore, to be considered here was, so far as its termini are to be regarded, Poti to Sparrow's Point. The only material liberty is in cl. 20, to this effect:

> Steamer has liberty to call at any port or ports in any order or places to bunker.

In my judgment, this charterparty in the matter of the voyage, on the language which I have quoted, is unambiguous. There is, in the language of Lord Esher, M.R., in *Leduc* v. *Ward* (3), at p. 481, only one voyage mentioned:

> from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other.

Any departure from that contract in the absence of exempting necessity would be a deviation. The ordinary practicable sea-track from Poti, in order to pass through the Black Sea, lies substantially in a line from Poti to the Bosphorus. This case is thus distinguishable from *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1), for here no question of impracticability of using one ordinary direct route arises. The question arises whether the actual course pursued by this ship to go from Poti to Constantza, a port on the west side of the Black Sea, and considerably north of the Bosphorus, involving approximately a whole further day in steaming, can be held, in the circumstances of this case, to be the contracted voyage.

The first, and perhaps the decisive, question to be considered is whether, on the authorities, there is any room for the sort of evidence which was before the judge which might be construed so as to vary the obligation to proceed along the ordinary commercial sea-track.

In my opinion, on the authorities, once it is held that the voyage provided is a direct route, no evidence of an agreement to the contrary can be considered: *per* Lord Wensleydale in *Grey* v. *Pearson* (5). In the recent case in the House of Lords, *Frenkel* v. *MacAndrews & Co., Ltd.* (2), Lord Buckmaster said, at p. 550:

> If . . . the fair construction of the bill of lading is that the route was direct

> . . . the appellant would be entitled to succeed, for an agreed term in a bill of lading must prevail over an agreement contrary to its terms.

He cites with approval the case of *Leduc* v. *Ward* (3), to which I have already referred, and the decision of the House of Lords in *Glynn* v. *Margetson & Co.* (4), and distinguishes that case from *Frenkel's* case (2), A on the ground that in the latter there was ambiguity as to the route to be followed. As to *Margetson's* case (4) and *Leduc's* case (3), he says, at p. 552:

> So far as the principle laid down in these cases is concerned it is, to my mind, this, that the route of a vessel declared to be lying at one port and bound for another must be construed as a direct route . . .

B

So also VISCOUNT SUMNER points out at p. 562:

> The authority of that case [*Margetson's* case (4)] is unquestionable but the limits of the decision are also clear. The termini of the bill of lading voyage were expressly stated.

C He also comments on the fact that in *Frenkel's* case (2) the words "with destination Liverpool" are not enough to show the terminus of the ship's voyage. LORD WARRINGTON OF CLYFFE says that the word "route" was, in *Frenkel's* case (2), an ambiguous word, and continues, at p. 567:

> Parol evidence would then be admissible to prove in which of these two senses it was used by the parties to the contract.

D

I do not think it necessary in this case further to consider the problem at any length. Once one has arrived at the conclusion that the essential words, "being so loaded [at Poti] shall with all convenient speed proceed to Sparrow's Point," are identical in tenor with the words, "lying at— E and bound for," as I think they are, there can be no question but that, in the absence of a proved trade custom in the strict sense, they completely define the object and intention of the contract.

Mr. Miller, for the respondents, did not attempt to set up such a custom. Indeed, on the evidence, it would not have been possible for F him so to do. A custom to add a term to the contract can be introduced into the contract only by showing that, that being a custom of the trade, it is presumed that a contract made by persons in that trade was intended to incorporate it, the presumption being that it is known to persons who engage in that trade; but it must be definite and uniformly adopted G and certain. It must be uniform as well as reasonable, and must have quite as much certainty as the written contract itself: *per* SIR GEORGE JESSEL, M.R., in *Nelson* v. *Dahl* (6). Here, at the highest, of 22 oil-burning ships, the evidence is that only 9 went to Constantza, after loading at Poti, bound for places beyond the Black Sea, and, of these, 3 went to H complete their cargo, so that only 6 proceeded direct to Constantza to bunker, and all but 1 belonged to the plaintiffs. This was during the material years 1932 and 1933. There being then no possible evidence of general trade custom, I can find no other factor to take the case out of the plain words of the charterparty, except the consideration of evidence which I consider not to be admissible. That evidence goes to show that, during material times, owing to the cheapness of oil at Constantza, all the plaintiffs' vessels, and about a quarter of the whole of the oil-burning vessels bound for the Bosphorus from Black Sea ports, were bunkered at Constantza, though the liberties in charters, other than in the case of one vessel beyond the plaintiffs' ships, were not considered.

It might well have been, on this evidence, had the charter been ambiguous, that this could rightly have been held to be, in the language of Viscount Sumner, "a usual commercial route," and it is upon this assumption that the judge has proceeded. However, he has come to his conclusion, in my opinion, by ignoring the salutary rule that, when the words are, in their literal meaning, unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words. In the present state of the authorities, in the absence of proved custom, a charter providing, without qualification, for a direct voyage must be taken to refer to the ordinary track by sea of the voyage from the one place to the other. It may be otherwise if there are alternative sea-routes, or where, on the facts, it is found that the only practicable route is not the direct one. This view also excludes any possibility of any reliance upon the liberty to bunker in this case, for it cannot be suggested that, if the voyage be direct from Poti to the Bosphorus, Constantza can be a port at which there is liberty to call.

Finally, it is argued that the defendants have waived any right which they might otherwise have had to contend that this ship was not in the course of her voyage at the time of the casualty. The judge has not accepted that view, which depends upon the fact that the evidence goes to show that a person, apparently acting for the charterers at Poti, was informed by the captain, in answer to his request that the captain should take on coals at Poti, that the captain would go to Constantza to bunker for oil. Such information given to the charterers' agent cannot, to my mind, support any possible waiver or estoppel. There is no evidence of the intention of the parties to vary the contract, nor did the plaintiffs, on being so informed, act in any way to their detriment. In the language of Bankes, L.J., in *Malmberg* v. *Evans* (*H. J.*) *& Co.* (7), at p. 39:

> It is quite consistent with what constantly and ordinarily happens in business, that one or other party to the contract does not insist on a strict compliance with its terms, and is content that the other party shall perform, perhaps not strictly, but still perform till something happens, when he says "I cannot allow this to go on; I must put down my foot and insist on performance of the contract with strictness."

Even if it could here be held that what the charterers did amounted to a waiver of their right to insist upon a direct voyage, they are in this further difficulty. The present defendants are guarantors under an ordinary form of average guarantee whereby, in consideration of the delivery of the cargo to the consignees, they guarantee the captain and owners the payment of a contribution to general average, but the consignees, at the time when the general average becomes due and the guarantee operates, would not necessarily be the charterers, and, therefore, the guarantors are no more bound by knowledge or waiver by the charterers of their rights under the bill of lading than would be an indorsee of that bill. For these reasons, I am of opinion that this appeal succeeds.

Clauson, L.J.: This is an appeal from a decision of Goddard, J., in an action by the owners of the Indian City against the defendants, who, by reason of an underwriters' average guarantee, are liable to the plaintiffs for any general average contribution due in respect of cargo shipped in that vessel by the charterers, and for a sum representing freight retained as the equivalent of jettisoned cargo. The stranding which gives rise to the claim for general average, and which was the occasion of the jettisoning, took place as the ship was entering the harbour of Constantza for the purpose of taking in oil bunkers. The question is whether, in calling at Constantza on the western shore of the Black Sea, the ship was on her chartered voyage. It is not suggested that the deviation clause would justify deviation to Constantza if the chartered voyage from Poti, the port of loading (on the eastern shore of the Black Sea), to Istanbul (at the outlet of the Black Sea), which was the next fixed point on the chartered voyage, lay along the direct sea-route. If the calling at Constantza is to be justified as between the ship and the charterers, and, accordingly, as between the plaintiffs and the defendants, it must be justified on the ground that the chartered voyage is *via* Constantza. The judge has held that the route Poti-Constantza-Istanbul was, at the material times, an ordinary commercial route for an oil-burning vessel to take, and that, on the true construction of the charterparty, having regard to the surrounding circumstances, this route is the chartered voyage. The contention which failed before the judge was that the chartered voyage between Poti and Istanbul was the direct sea-route. If that contention ought to succeed, the appeal must be allowed, there must be judgment for the defendants, and the retained freight must be released to the defendants.

The question accordingly is: What was the contractual voyage? The answer to that question depends upon the true construction of the charterparty. For the purpose of ascertaining the true construction of that document, the court must, as in all cases of construction of contractual documents, have regard to the surrounding circumstances in which the document was executed.

On investigating those circumstances, it may be found that in fact there is some custom or usage of trade, not expressly mentioned in the contract, but which the parties may properly be supposed to have had in mind when they entered into the contract of affreightment. As was pointed out by Coleridge, J., in *Brown* v. *Byrne* (8), at pp. 715, 716, it is common, in contracts as to the subject-matter of which known usages prevail, to find that the parties proceed on a tacit assumption of those usages. They commonly reduce to writing the special particulars of their agreements, but omit to specify those known usages, which are included, however, as of course by mutual understanding. Accordingly, among the surrounding circumstances to be investigated, and of which evidence is receivable, are the circumstances relating to such a custom or usage as is mentioned above.

Further, on investigating the circumstances, it may be found that, while the words of the contract, on the face of them, seem to be clear, the application of the words to the circumstances as known to the parties at the time brings out the possibility of the words applying to two different things or subject-matters, and, if this be found to be the case, evidence is admissible to show which was the thing or subject-matter intended: *Smith* v. *Jeffryes* (9), at p. 562, *per* Alderson, B.

Before turning to the terms of the charterparty and investigating the circumstances in which the present contract was executed, and before considering what bearing, if any, they have on the true construction to be placed on the words which, in the present contract, define the contractual voyage, it may be useful to consider shortly some of the recent reported cases in which a like problem had to be solved.

In *Leduc* v. *Ward* (3), it became necessary to ascertain what was the contractual voyage for the purposes of a bill of lading. The material words to be construed were:

> shipped on steamship Austria now lying in the port of Fiume and bound for Dunkirk to be delivered at the aforesaid port of Dunkirk.

The ship proceeded from Fiume to Glasgow with a view of ultimately reaching Dunkirk. She was lost off Glasgow. The surrounding circumstances agreed or proved were (i) that Glasgow was far off any direct route from Fiume to Dunkirk, and (ii) that the shippers knew that the owners intended to send the ship to Dunkirk *via* Glasgow. It was held that the material words described a voyage, and it was also held to be the universal usage of business men to interpret the voyage, as marked out by the material words, as a voyage on the ordinary track by sea from the one place to the other—that is, the ordinary track according to a reasonable construction of the term: *per* Lord Esher, M.R., at p. 481. The evidence as to the shipper's knowledge of the owners' intention was rejected as inadmissible on the question of construction. It was incidentally held that a power to call at ports meant to call at ports which are substantially ports which will be passed on the named voyage.

In *Glynn* v. *Margetson & Co.* (4) it again became necessary to ascertain what was the contractual voyage for the purposes of a bill of lading. The material words to be construed were: "Shipped in steamship Zeta now lying in the port of Malaga bound for Liverpool." There were very wide words giving liberty to proceed to, and stay at, any port or ports in any rotation over a very wide area. The Court of Appeal held that the voyage described was from Malaga to Liverpool, and that, if there were nothing else in the bill of lading, the ship would be bound to go from

Malaga to Liverpool according to the ordinary sea-course for a steamer from the former port to the latter, and that she would not be entitled to stop or to call at any other port, although it was on that course. She would be bound to go straight. The court also held that the very wide words as to proceeding to and staying at various ports must be construed A as subject to the limitation that they must be ports on the geographical voyage. To construe the words otherwise would (so the court held) fail to give due meaning to the primary words describing the voyage. In the House of Lords, the House took the same view as did the Court of Appeal, and it is perhaps useful to note that LORD HALSBURY B reaffirmed the principle stated in 1803 by LORD ELLENBOROUGH, C.J., in *Robertson* v. *French* (10), at p. 135, that the meaning of any document is to be collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as C by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense.

In the case of *Evans, Sons & Co.* v. *Cunard S.S. Co., Ltd.* (1), in 1902, it was once more necessary to ascertain what was the contractual voyage for the purposes of a bill of lading. The material words defining the voyage D were: "Shipped upon the steamship Veria now lying in the port of Bari bound for the port of Liverpool." The jury seem to have found that Constantinople (where the ship had called on the voyage from Bari to Liverpool) was on the customary route from Bari to Liverpool. The judge accepted evidence that the only practicable way to get a cargo E from Bari to Liverpool was by a more or less uncertain route which passed Constantinople, and that, since that was the only practicable route, that must be the voyage in the business sense agreed upon. I understand him to have decided (to use the words of LORD ELLENBOROUGH cited above) that, on the evidence, the words to be construed F had, by the known usage of trade, and in view of the special circumstances as to the circuitous course being the only practicable course, acquired a peculiar sense—namely, "bound for Liverpool by the circuitous route which passes Constantinople"—as distinct from the *prima facie* sense—namely, "bound for Liverpool by the straight sea course"—which, G according to *Glynn* v. *Margetson & Co.* (4), the words would, apart from the remaining circumstances, have borne.

In *Frenkel* v. *MacAndrews & Co., Ltd.* (2), it became necessary to decide, for the purposes of a bill of lading, what was the contractual voyage. There was no express statement of the contractual voyage in H the document. VISCOUNT SUMNER said, at p. 561:

> Evidence was needed to prove what that voyage was and that evidence was tendered and was admitted without objection.

The circumstances, which were undisputed, were, as stated by LORD WARRINGTON OF CLYFFE, that the ship was one of a line pursuing a regular course of trading, in accordance with which her usual and customary routes with goods from Malaga destined for Liverpool would be determined by ascertaining whether she was at Malaga on the outward or on the homeward section of her voyage. If the former, her route from Malaga would be concisely described as "*via* Levante,"—namely, *via* the east coast of Spain—if the latter, as "directo." The word "route" appeared in the deviation clause, and, accordingly, while it was clear that the parties contemplated a "route" to be followed by the ship carrying the goods referred to in the bill of lading, the "route" might be the one route or the other. The word was ambiguous.

The parol evidence, which, in view of the failure of the document to define the route, and in view of the ambiguity which, in the circumstances, attached to the route, was thus admissible, showed clearly that the parties understood that the voyage in contemplation was "*via* Levante," with the result that the loss which had occurred was held in fact to have occurred on the contractual voyage.

It is noteworthy that LORD BUCKMASTER was careful to express the view that the route of a vessel declared to be lying at one port and bound for another must be construed as a direct route, and the circumstance of knowledge that it was not, or might not be, direct would not affect that construction. VISCOUNT DUNEDIN, while accepting, as I understand it, the authority of *Leduc* v. *Ward* (3) and *Glynn* v. *Margetson & Co.* (4), and thus, as I venture to infer, in no way differing from the view of LORD BUCKMASTER as expressed above, points out, as I read his observations, at p. 557, that it may turn out, on investigation of the surrounding circumstances, that there are two alternative routes, either of which would fairly come within the phrase "the ordinary track by sea" (in which case the ambiguity must, of course, be solved by extrinsic evidence), or it may turn out that "the ordinary track by sea" is not a direct geographical route, but a circuitous route adopted by custom, or general understanding, as the "ordinary route." VISCOUNT SUMNER clearly, and even emphatically, adopts the authority of *Leduc* v. *Ward* (3) and *Glynn* v. *Margetson & Co.* (4) as unquestionable in a case where the termini of the contractual voyage are expressly stated.

With the light afforded by these authorities, I turn to the consideration of the construction of the charterparty in the present case, in view of the surrounding circumstances as they stood at the time of its execution.

The charterparty is dated Sept. 1, 1933, and is for 3 steamers in 3 successive months. The voyage in question in this action is that of the third steamer. For the purpose of construing the charterparty, the surrounding circumstances to be considered must, I venture to think, be those existing at the date of signature, Sept. 1, 1933. Such of the evidence as deals with matters which occurred after that date cannot be relevant for the purpose of construction. I therefore propose to disregard, for this purpose, such facts as occurred after Sept. 1, 1933, including, for example, evidence as to knowledge acquired by the charterers, through their agents or otherwise, after Sept. 1, 1933.

The surrounding circumstances as at Sept. 1, 1933, may be summarised as follows. The direct sea-route from Poti (on the eastern shore of the Black Sea) to Gibraltar lies through Istanbul, and leaves Constantza (which is on the west coast of the Black Sea) a very substantial distance away to starboard. Oil fuel at the material dates was available at Constantza on more favourable terms than at Istanbul. The facts as to the sailings of oil-burning ships from Poti to the Mediterranean were matters of investigation at the trial, and, owing probably to errors of transcription, were not quite accurately stated in the judge's judgment. However, as the result of a considerable measure of discussion between counsel in this court, it was, I think, agreed that those facts were substantially as follow: that, of the oil-burning steamers leaving Poti and other eastern Black Sea ports for the Mediterranean during the 3 years preceding the material date, about three-quarters went from their eastern Black Sea loading ports direct to Istanbul, and about one-quarter went off the direct route proceeding to Constantza for oil-bunkering, and on thence to Istanbul. Practically all the ships belonging to the plaintiffs were among those which thus went off the direct route and proceeded *via* Constantza, and several of the plaintiffs' ships so proceeding were under charter to the charterers in the present case. The judge on these materials found that this route *via* Constantza was, by the autumn of 1933, a well-recognised and accustomed route for ships proceeding from the eastern Black Sea to Istanbul or ports beyond.

I turn now to the charterparty which has to be construed. It provides by cl. 34 for three steamers in October, November and December, 1933. Each steamer, after delivery of her outward cargo (which delivery was, in the case of the steamer actually in question, at Genoa), is to be in loading port and ready to load (see cl. 10) within certain dates in those months. The steamers are to load at Nicolaieff or Poti, and, being so loaded, with all convenient speed are to proceed to one of a number of named ports, all trans-Atlantic. There is machinery provided for giving orders exercising the option as between the loading ports of Nicolaieff and Poti by the time the steamer on her route from Genoa (or other her port of delivery of her previous cargo) is off Istanbul. This option was in fact duly declared for Poti. There is also machinery for declaring the option as to the trans-Atlantic destination by the time the steamer reaches Gibraltar. Owing to the stranding at Constantza, the ultimate destination of the ship was in fact ultimately altered by agreement, but that, of course, has no bearing on the construction. For purposes of construction, in view of the facts as to the port of delivery of the outward cargo, and of the option as exercised, the words in the charterparty dealing with the voyage must be taken, in my judgment, to read as follows: "The ship to proceed from Genoa with all convenient speed to Poti and there load and being so loaded with all convenient speed proceed to Istanbul and thence to a trans-Atlantic port to be named." Istanbul is, of course, at the only outlet from the Black Sea.

The case for the defendants, which failed before GODDARD, J., was put thus. The words to be construed mean that the ship is to proceed from Poti to Istanbul on the ordinary track by sea of the voyage from Poti to Istanbul, the ordinary track according to a reasonable construction of the term. The evidence (so the defendants say) amounts to this, that, while the direct sea route is the ordinary track, it is, of course, possible to take a special track from Poti to Constantza and on to Istanbul, and no doubt an owner who wishes to bunker with oil at Constantza will depart from the ordinary track and send his ship round by the special track. Many owners of oil burning ships during the period preceding the date of the charterparty in fact did so, and the plaintiffs in fact seem usually to have done so. In the document now to be construed, however, "Poti to Istanbul" means the ordinary track, and cannot be construed otherwise. Assuming that it be the fact that the charterers knew that the owners intended to take the special track *via* Constantza, the defendants say that that knowledge is, as decided by *Leduc* v. *Ward* (3), of no avail to modify the express terms of the document.

The case for the plaintiffs, as I understand it, was ultimately put thus. The words to be construed are, when the circumstances are taken into account, ambiguous. "Proceed to Istanbul" means, no doubt, "proceed by the ordinary track by sea," but the circumstances show that there are two "ordinary tracks by sea," one straight to Istanbul and the other Poti-Constantza-Istanbul. The words used turn out to be ambiguous. It is, therefore, necessary to search for the meaning attached to the phrase by looking outside the words of the document and discovering the intention of the parties upon evidence *dehors* the contract. They go on to say that, in view of the practice of the plaintiffs and of the known facts as to the convenience and economy of oil-bunkering at Constantza, GODDARD, J., was right in concluding that the intention of the parties was that the voyage should be Poti-Constantza-Istanbul.

There is, as I venture to suggest, no doubt at all that one may have more than one "ordinary track by sea" from point A to point B. VISCOUNT DUNEDIN in *Frenkel* v. *MacAndrews & Co., Ltd.* (2), at p. 557, gives the case where there may be a choice between the Suez Canal, the Panama Canal, or round Cape Horn. *Frenkel's* case (2) was a case where there were two "ordinary tracks by sea"—namely, "*via* Levante" and "directo." The plaintiffs' contention is that the present case is one in which there are two "ordinary tracks by sea," one the direct line Poti-Istanbul and the other the more circuitous track Poti-Constantza-Istanbul. The plaintiffs say, and say truly, that some owners prefer the one route and some the other. One gets the benefit of a shorter line by one, but one gets the advantage of greater bunkering convenience by the other. There are in the present case, they say, two "ordinary tracks by sea," and not one only.

In my view, the defendants' submission is the correct one. It does not appear to me to be true to say that there is in the present case any ambiguity, or that there are two "ordinary tracks by sea." There is one track Poti-Istanbul, from which some traders diverge for special reasons, so as to reach Istanbul by a special and circuitous route *via* Constantza. The termini of the voyage are fixed. It is not a case of the existence of such purely navigational alternatives as are envisaged by Viscount Dunedin in the passages to which I have referred in his opinion in *Frenkel* v. *MacAndrews & Co., Ltd.* (2). It is not a case of two alternating routes, such as the homeward and outward routes, each passing Malaga, which existed in the same case. The two routes Poti-Istanbul and Poti-Constantza-Istanbul seem to me not to be alternative routes. In view of the cases of *Leduc* v. *Ward* (3) and *Glynn* v. *Margetson & Co.* (4), and the views in regard to a route between fixed termini indicated by Lord Buckmaster, and (as I venture to add) by Viscount Dunedin and Viscount Sumner in *Frenkel* v. *MacAndrews & Co., Ltd.* (2), the Constantza route cannot, in my view, be treated as a mere alternative route. It is a deviation for special purposes from the ordinary route by sea, and none the less a deviation by reason of its being, at the material time, for reasons connected with the price of oil at Constantza, a not uncommon deviation. For these reasons, I feel compelled to differ from the decision of Goddard, J. For my own part, I should allow the appeal, enter judgment for the defendants, and order the deposited freight to be paid over to the defendants.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *Botterell & Roche* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

THOMPSON (OTHERWISE HULTON) *v.* THOMPSON (CAUSTON INTERVENING).

[Probate, Divorce and Admiralty Division (Langton, J.), **March 31, April 5, 1938.**]

Divorce—Adultery—Certificates of virginity—Onus of proof—Intervention by King's Proctor—Costs of intervention where decree allowed to stand.

During the hearing of an undefended divorce suit, it appeared that the woman named had supplied the petitioner's solicitors with medical certificates as to her virginity. She had refused the request of those solicitors that she should submit herself to examination by a doctor named by them. The matter was referred to the King's Proctor for inquiry. An intervention followed wherein it was alleged that the named woman had not committed adultery. At the hearing fresh evidence was called, but it was found as a fact that the certificates were, in fact, given in respect of the woman named:—

Held: (i) the certificates raised a strong presumption in favour of the woman named, but the evidence was sufficient to discharge the increased burden of proof upon the petitioner.

(ii) the King's Proctor should pay three-quarters of the petitioner's taxed costs of the intervention.

[**EDITORIAL NOTE.** It is understood that the law officers take the view that the question of costs in the case of an intervention at the suggestion of the court is one upon which they ought to take the views of the Court of Appeal and that this decision will be the subject of an appeal.

As to Costs of Intervention, see HALSBURY, Hailsham Edn., Vol. 10, pp. 769, 770, para. 1215; and for Cases, see DIGEST, Vol. 27, pp. 485-487, Nos. 5160-5184.] A

Cases referred to:

(1) *Chalmers* v. *Chalmers*, [1930] P. 154; Digest Supp.; 99 L.J.P. 60; 142 L.T. 654.

(2) *Jolly* v. *Jolly & Fryer* (1919), 63 Sol. Jo. 777; 27 Digest 295, *2723*.

(3) *Harry* v. *Harry* (1919), *Times Newspaper*, April 4, 5.

(4) *Rutherford* v. *Richardson*, [1923] A.C. 1; 27 Digest 488, *5196*; 92 L.J.P. 1; 128 L.T. 399. B

(5) *Higgins* v. *King's Proctor, King's Proctor* v. *Carter*, [1910] P. 151; 27 Digest 487, *5178*; *sub nom. Higgins* v. *Higgins, Carter* v. *Carter*, 79 L.J.P. 37; 102 L.T. 259.

Wife's petition for divorce on the ground of adultery. The husband C and woman named, who intervened, filed answers denying the charges, but subsequently intimated that they would not, and in fact did not, defend the suit. Pending the hearing the intervener's solicitors sent to the petitioner's solicitors copies of certificates obtained from two eminent gynæcologists, to the effect that the intervener was *virgo intacta*. At the D hearing, the existence of the certificates having been brought to the attention of the judge, he pronounced a decree *nisi*, but directed that the papers should be sent to the King's Proctor for inquiry.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *H. W. Barnard* for the King's Proctor. E

Roland Oliver, K.C., and *R. Bush James* for the petitioner.

Langton, J.: On July 9, 1937, the petitioner, Mrs. Thompson, otherwise known as Dame Florence Hulton, presented a petition before me in this court asking for the dissolution of her marriage with Major F John Henry Thompson, on the ground of his adultery with Miss Peggy Causton. Evidence was given at the hearing by two domestic servants, working in a house at Peppard near Henley-on-Thames, proving that Major Thompson and Miss Causton had stayed together at this house and together occupied the same bedroom. This evidence was supple- G mented by evidence from two hall-porters from Cumberland Mansions, proving further association between Major Thompson and Miss Causton at Miss Causton's London address. Major Thompson had appeared and put in an answer to the petition, and Miss Causton had intervened and had also put in an answer. The solicitor representing the respondent H and the intervener was Mr. Hyam Davis. On May 28, 1937, Mr. Davis wrote to the petitioner's solicitors, Messrs. Withers & Co., saying that his clients did not intend to defend the suit any further. The case accordingly came before me as an undefended suit, nd, upon the evidence which I have recapitulated above, I granted the petitioner a decree *nisi*.

At the conclusion of the evidence, I adverted to a matter which Mr. Roland Oliver, for the petitioner, had very properly brought to my notice at the commencement of the proceedings. In Dec., 1936, the month in which Major Thompson and Miss Causton had filed their answers in the suit, Mr. Hyam Davis, acting on behalf of Miss Causton, had sent to Messrs. Withers & Co., acting for Lady Hulton, copies of two certificates which were purported to have been obtained from two eminent gynæcologists—namely, Dr. A. Galletly of 20, Harley Street, and Mr. Everard Williams, of 5, Wimpole Street, to the effect that they had separately and on different days examined Miss Margaret Causton and found that her hymen was intact. To this communication Messrs. Withers & Co. made the not unnatural answer of a suggestion that Miss Causton should submit herself to an examination by a doctor whom they thereupon named—Dr. John Bright Banister, of 149, Harley Street. Miss Causton immediately refused to submit to any further examination, and the case proceeded as a defended case, without further reference to this somewhat startling assertion on the part of the intervener, until the moment when Mr. Davis acquainted Messrs. Withers & Co., in May, 1937, with the fact that the suit would no longer be defended.

Accordingly, at the same time that I granted Lady Hulton her decree, I directed that the papers should be sent to the King's Proctor, to enable him to inquire into the case, with the special object of discovering the true facts concerning Miss Causton's alleged visits to the two doctors whom she had named. I am happy to see, from the transcript of the notes of the proceedings, that in taking this action I made it clear that I intended to make no reflection upon the *bona fides* of Lady Hulton, the petitioner, in the suit. The inquiries made by the King's Proctor in pursuance of my direction have presented me with more than one awkward problem for solution, but it is due to the petitioner at the outset to say that none of the difficulties that have arisen are in any way due to any fault on her part, or to any mistake or omission on the part of her advisers.

On Mar. 4 last the King's Proctor presented a plea alleging (i) that the decree *nisi* which I had granted on July 9, 1937, had been obtained contrary to the justice of the case, (ii) that the respondent had not committed adultery with the intervener, and (iii) that the intervener was at all material times a virgin. The petitioner, again represented by Mr. Roland Oliver and Mr. Bush James, appeared to contest this plea, and put in an answer thereto which in effect raised two substantial issues—namely (i) whether or not Miss Margaret Causton was a *virgo intacta*, and (ii) whether adultery had been committed by Major Thompson and Miss Causton. It becomes a matter of argument during the proceedings as to how far the petitioner should be allowed to go in the way of adducing fresh evidence of adultery between the parties. In an earlier case heard this term upon a plea raised by the King's Proctor, I refused to hear any fresh evidence at all on behalf of the petitioner upon the consideration of the King's Proctor's plea. I pointed out that it was necessary to remember that the hearing of such a plea was neither an appeal from the original hearing, nor a re-hearing, nor a new trial of the case. In that case, however, the fresh evidence which it was sought to adduce raised matter which was outside both the issues raised on the King's Proctor's plea and the scope of the orignal petition. When once the plea had been established, the case for the decree which had been granted disappeared, and, although, since there was no fault upon the part of the petitioner, it was unnecessary to dismiss her petition, and possibly to allow it to be reconstituted, it was clear that I could not proceed any further at that moment with a petition which had become manifestly incomplete. In the present instance, the fresh evidence which has been offered is both relevant to the issues raised on the King's Proctor's plea and within the scope of the original petition, being, in fact, an amplification of the evidence already adduced. I ruled, therefore, that the petitioner could call fresh evidence to counter the plea of the King's Proctor, so long as that evidence could properly be offered, upon the facts raised in the petition. I intended by this ruling to give the petitioner the full latitude to which I think she is entitled in order to support her decree. At the same time, I aimed at ensuring that no injustice should be done to Miss Causton or to Major Thompson by allowing any fresh matter, to which they had not pleaded, and to which they might have desired to make answer, to be alleged against them. Turning to the first issue between the parties, the two gynæcologists who had given certificates to Miss Causton were called before me. They agreed in averring that the lady's hymen was intact, but they did not agree upon very much else concerning her. Whereas Dr. Galletly said that the hymen he examined was more elastic than inelastic, Dr. Williams spoke of tension in the hymen, and appeared to consider that it was markedly inelastic. The certificates themselves are both confined to a bare statement that the hymen was intact.

The principal controversy upon this first issue turned upon the identification of Miss Causton as the lady who, in fact, was examined by these doctors in Nov., 1936, and Dec., 1936. Dr. Williams was frankly unable to identify the lady at all, though he spoke to her having apparently recognised various objects in his consulting-room when she was brought there by a representative of the King's Proctor's department, after the hearing of the petition. Dr. Galletly was able to go a great deal further, and was ready to state that, having seen the young woman again, and conversed with her, he had no reason to doubt that she was the lady who had presented herself for examination. However, he too fell short of complete identification, and was unable to swear positively that she was the lady in question. I have accordingly been left in some doubt by the only evidence which could have established this part of the issue conclusively in favour of Miss Causton. I have been obliged to weigh the possibilities, and to consider with great care the evidence of Miss Causton herself upon this subject. I think that the balance falls in favour of Miss Causton, and that I must find that she is the lady who was examined by Doctor Galletly and Mr. Williams, and certified by them to have a hymen intact.

This brings me to a consideration of the second issue, in circumstances A of most unusual difficulty. Mr. Oliver conceded, as he was bound to do, that Miss Causton's condition, although not conclusive upon the question of adultery, made the burden very considerably heavier upon his client. The full strength of the petitioner's case upon this second issue was then developed before me, and proved to be a very different matter from the B somewhat perfunctory evidence which had been called in the first instance. As was pointed out by HILL, J., in *Chalmers* v. *Chalmers* (1), proof that the hymen of the woman accused of adultery is intact, though not absolutely conclusive, puts a very heavy burden upon the party claiming that such a woman has committed adultery. Moreover, in the present case, I have C never lost sight of the fact that neither Miss Causton nor Major Thompson has been represented in these proceedings, and it is accordingly my duty to be especially careful in making inferences against them. On the other hand, no one nowadays contends that the fact that a woman accused of adultery is found to be *virgo intacta* is inconsistent with partial D intercourse, sufficient to sustain the charge of adultery. The finding of HILL, J., in *Jolly* v. *Jolly & Fryer* (2) is an instance in point, and shows that this most careful and discriminating judge was ready to find what he has so properly described a " very heavy burden " discharged where the circumstances disclosed by the evidence warranted such a E conclusion. Similarly, the decision of COLERIDGE, J., in *Harry* v. *Harry* (3), shows that a medical certificate of this character is in no way conclusive. In *Rutherford* v. *Richardson* (4), VISCOUNT BIRKENHEAD, at p. 11, uses language which is apposite to the present case :

> The evidence of the doctor was cautious and guarded. It seems, however, to F establish that there had been no penetration and, in the doctor's opinion, that the appearance of the organs was such as he did not think was consistent with an effective attempt at penetration. Some suggestion was made in argument in this House that this condition, even though inconsistent with penetration, was not inconsistent with some lesser act of sexual gratification. If there were evidence of such an act, it cannot be doubted that, whatever view may have been taken in past ages in the ecclesiastical courts, a decree based upon adultery might issue.

G In the present case, I have had useful evidence from Dr. Beckett Overy, a well-known gynæcologist, upon the general question of the various forms of sexual gratification which might be obtained without rupturing the hymen, but Dr. Beckett Overy had not seen or examined Miss Causton. This evidence is consistent, of course, with the cases to which I have H referred above. However, when this evidence and all these cases are weighed and considered, the burden remains, and the court should be slow to make an adverse inference against a lady so strongly protected. In such circumstances, I have felt that I could be satisfied with quite a small measure of reliance upon the evidence of Major Thompson and Miss Causton to support their sworn denial.

Unfortunately, however, I have been able to place no reliance at all upon Major Thompson, and very little indeed upon Miss Causton, where matters of major importance are concerned. Major Thompson was in no way an impressive witness.

There remains the final question of how far this long-continued association, in circumstances of such a highly compromising character, rendered doubly suspicious by the ineffectual denials of the parties, should weigh in the balance against the medical certificates, guarded but precise, of Dr. Galletly and Mr. Williams. I have deliberated long and carefully upon this subject, and, in spite of the strong presumption in her favour, I cannot escape the inference which arises from the fact that Major Thompson and Miss Causton, who are admittedly on terms of deep affection, have certainly slept together in the same room at Peppard, and almost certainly slept together in the same bed in London, and have been at great pains to deceive both the world and this court in the matter of their behaviour. I am regretfully forced to the conclusion that the respondent and the intervener in this case have had mutual intercourse, amounting to adultery in law.

I must accordingly find in favour of the petitioner upon the second issue, and, although the King's Proctor's intervention is abundantly justified by his success upon the first issue, the decree of July 9, 1937, granted by this court will stand.

The problem of costs is a very difficult problem for solution and I have deliberated upon it very carefully.

The case which was brought to my attention, the *Higgins* case (5), establishes, of course, quite clearly that the King's Proctor is in the same position, and on the same footing, as any ordinary litigant. He should have the advantages as well as the disadvantages of that position. I have approached this problem entirely upon that footing. It is one of those cases in which, if one approaches it upon the footing that both sides are ordinary litigants, it is impossible to escape inflicting a hardship upon one side or the other.

Without going into all the details for my reasons in the matter, it appears to me that there is more hardship in putting the whole of this expense upon the petitioner than there would be in putting it upon the King's Proctor. Without, therefore, suggesting in any way—I do not wish to suggest—that the King's Proctor has done anything except the whole of his duties, and has done it at my instigation and suggestion, I think that the justice of this case will be met by the King's Proctor paying three-quarters of the taxed costs of the petitioner in this intervention.

Leave to appeal as to costs.

Solicitors: *Treasury Solicitor* (for the King's Proctor); *Withers & Co.* (for the petitioner).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

SIR GREY SKIPWITH (BART.) *v.* HOMEWOODS SAWMILLS, LTD.

[CHANCERY DIVISION (Morton, J.), **March 24, 25, 28, 29, 30, 1938.**]

Agriculture—Timber—Sale of standing trees—Assignability of a part of the benefit of the contract—Whether the word "timber" referred to the whole of the tree or merely the trunk—Obligation to remove everything sold—Lops and tops left on the ground—Damages for non-removal.

By a contract in writing dated Sept. 6, 1933, made between the vendor and the defendants, the defendants purchased, *inter alia*, several lots of trees then standing and growing on lands belonging to the vendor. By the terms of the contract, the defendants agreed with the vendor and his assigns to pay compensation for any avoidable damage which might be done in the removal of the lots, and further undertook to cut and clear all the lots from the lands by Mar. 25, 1936, and, if any timber should not be removed by that date, the defendants should become liable for any damage that might be occasioned to the vendor by reason of such non-removal. Subsequently, by two conveyances of Nov. 11, 1933, and July 12, 1934, the vendor conveyed certain lands to the plaintiff, which included the lands upon which then stood the trees comprised in the various lots sold to the defendants. These trees were excepted from the respective sales to the plaintiff, and the lands were sold subject to the contract and the rights of the vendor and the defendants contained therein. By an assignment of Apr. 27, 1936, between the vendor and the plaintiff, the vendor assigned to the plaintiff the benefit of all the provisions on the part of the defendants (other than the payment of the purchase money) contained in the contract, so far as the same were for the benefit of the lands comprised in the conveyances. The defendants felled the trees and removed the trunks before Mar. 25, 1936, leaving behind the lops and tops of the trees on the plaintiff's lands, and refused to remove them. The plaintiff instituted proceedings claiming damages in respect of (i) the cost of removing the lops and tops of the trees, (ii) loss in the exercise of the sporting rights, and (iii) damage caused to growing timber by the non-removal of the lops and tops. The defendants maintained that, according to the true construction of the contract and the custom of the trade in trees, the word "timber" did not include tops or lops of trees, and, further, that the plaintiff was a stranger to the contract, and they were not liable to him in respect of any breach of it:—

HELD: (i) the word "timber" in the contract was used in a comprehensive sense, and could not be read as referring to only the trunks of the trees.

(ii) the assignment of Apr. 27, 1936, transferred to the plaintiff all the benefit of the contract other than the right to receive the purchase money.

(iii) the lops and tops of the trees which were not removed remained the property of the defendants, and there had been a breach of the contract to remove them, and the plaintiff was entitled to damages in respect of such breach.

[**EDITORIAL NOTE.** The position which arises under a contract for the sale of timber is here fully considered. The contract itself may include some unusual terms, but in the main the question that emerges concerns the rights of the land-owner to have the felled timber removed from his land. In so far as the judgment deals with the removal of lops and tops, it applies *a fortiori* to the removal of the timber itself, and this is the question that usually arises under contracts of this kind.

AS TO CONTRACTS FOR SALE OF TIMBER, see HALSBURY, Hailsham Edn., Vol. 1, pp. 431, 432, para. 737; and FOR CASES, see DIGEST, Vol. 2, pp. 93. 94, Nos. 736-741, and p. 100, Nos. 804-810.]

Cases referred to:

(1) *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) v. *Tolhurst*, [1902] 2 K.B. 660; 8 *Digest* 424, *29*; 71 L.J.K.B. 949; 87 L.T. 465; *affd.* on other grounds, [1903] A.C. 414.

(2) *Dawson* v. *Great Northern & City Ry. Co.*, [1905] 1 K.B. 260; 8 Digest 432, *96*; 74 L.J.K.B. 190; 92 L.T. 137.

(3) *Ellis* v. *Noakes*, [1932] 2 Ch. 98, *n.*; Digest Supp.; 101 L.J.Ch. 409, *n.*; 147 L.T. 453, *n.*

(4) *Finlay (James) & Co.*, v. *N.V. Kwik Hoo Tong Handel Maatschappij*, [1928] 2 K.B. 604; Digest Supp.; 97 L.J.K.B. 817; 139 L.T. 582; *affd.*, [1929] 1 K.B. 400.

(5) *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 17 Digest 126, *343*; 81 L.J.K.B. 1132; 107 L.T. 325.

(6) *Forster* v. *Baker*, [1910] 2 K.B. 636; 8 Digest 428, *68*; 79 L.J.K.B. 664; 102 L.T. 522; *affg.* S.C. *sub nom. Bowles* v. *Baker*, 26 T.L.R. 243.

(7) *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349; 8 Digest 428, *67*; 90 L.J.Ch. 116; 124 L.T. 664.

(8) *Williams* v. *Atlantic Assurance Co., Ltd.*, [1933] 1 K.B. 81; Digest Supp.; 102 L.J.K.B. 241; 148 L.T. 313.

(9) *Burton* v. *English* (1883), 12 Q.B.D. 218; 17 Digest 294, *1069*; 53 L.J.Q.B. 133; 49 L.T. 768.

Action by the plaintiff for damages for breach of contract in regard to the sale of standing timber by the non-removal of the lops and tops of the trees which had been cut down and the trunks only removed.

C. E. Harman, K.C., and *A. Guest Mathews* for the plaintiff.

B. B. Stenham and *Frank Whitworth* for the defendant company.

Harman, K.C.: Timber here does not mean the bole of the tree. Timber and trees are here synonymous. There is a breach of contract if all the lots are not cleared by a certain day, and on Mar. 26, 1936, there was a breach of contract, which has continued. [Counsel referred to *Ellis* v. *Noakes* (3), *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.* (1), *Dawson* v. *Great Northern & City Ry. Co.* (2), *Finlay (James) & Co.* v. *N.V. Kwik Hoo Tong Handel Maatschappij* (4), *British Westinghouse Electric Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.* (5).]

Stenham: Timber here has a restricted meaning, and the particular language in the conditions of sale is ambiguous. There is an assignment here of a part of the benefit of the contract, which can be made only in equity, in which case the vendor should have been joined. The plaintiff had a duty to mitigate his damage, and he could have got the work done for nothing if he had given the defendant company a licence to come on the land. [Counsel referred to *Forster* v. *Baker* (6), *Re Steel Wing Co., Ltd.* (7), *Williams* v. *Atlantic Assurance Co., Ltd.* (8), *Burton* v. *English* (9).]

Harman, K.C., in reply: There is no evidence here that the lops and tops were ever saleable at all. All that were marketable were such as had some approach to a road. I cannot mitigate the damages by disposing of property which is not mine. Had an arbitration been held, the arbitrator would have had to determine what it would have cost to put the plaintiff in the position in which he would have been if the contract had been carried out. If the defendants had not refused to countenance an arbitration, all this would never have happened.

Morton, J.: The history of this case begins with a contract dated Sept. 6, 1933. The name of the vendor does not appear on the contract, but it appears from other documents, and it is not disputed, that the vendor was a Mr. Thomas Place. The purchasers were the defendants in this action, Homewoods Sawmills, Ltd. The contract, which is a curious one in its wording, is contained in a document consisting of certain conditions of sale, a supplemental document containing special conditions and a memorandum at the end, signed by the purchasers. It is necessary to consider this document as a whole in order to arrive at a conclusion as to how it should be construed, the claim in this action being a claim by the plaintiff against Homewoods Sawmills, Ltd., for damages for breach of contract. The first page of the particulars of sale contains the statement that certain gentlemen were " instructed to sell by private tender, the following standing timber," and then there follows a list of 11,365 oak trees and various other trees. I have had evidence led before me that the word " timber " in the timber trade has a particular meaning, and that it means the trunk or bole of the tree. I have also had evidence that in the timber trade a particular meaning was attached to other words and phrases, but I have come to the conclusion, for reasons which I shall indicate, that in this contract the word " timber " is used in a loose and comprehensive sense. The first of these reasons is that there is described as " standing timber " the large number of trees to which I have referred. Then there come: " Remarks." I think that I am entitled to look at this document as a whole, including these remarks, which are as follow: " The timber is mostly of convenient access to the main road." That is again, I think, using " timber " as synonymous with " trees," but that may or may not be so. Then follows a schedule of lots, of which Lot 1, taking that as an example, contains the following trees: " 13 oak trees, 361 oak trees, 1,250 oak poles, 85 ash trees and 340 larch poles," these apparently being what has been described as the timber sold on lot 1. I need not go through all the lots. The lots purchased by the defendants were lots 1, 2, 3, 4, 8, 9, 10 and 11. It is admitted by Mr. Stenham, for the defendants, that, under the contract, the whole of these trees, including the tops and lops, as they are called, became the property of the purchasers on severance. I need not read Condition 1 of the conditions of sale. Condition 2 is as follows:

> The timber is to be removed from the woods by the proper and defined rights-of-way only to the highways.

I pause there to say that I think that it is really impossible to read " timber " there as referring to the trunks only of the trees. I think that it must mean that whatever has been bought is to be removed from the woods by the proper and defined rights-of-way only. I cannot conceive that that condition was intended to be limited to the trunks. Then Condition 3 is as follows:

> Purchasers will be liable to pay compensation for any avoidable damage which may be done in the removal of their lots [that is to say, the whole of the trees which they have purchased], and also shall indemnify the vendor against any claims for compensation for damage for the like cause or causes made against them by any third party. A

Then follows a condition in regard to the cutting or removing of any tree, pole or sapling which is not included in the present sale. I can omit Condition 5, and go to Condition 6, which is as follows: B

> The respective purchasers shall not carry off or remove their several purchases or any part thereof until their respective purchase moneys shall be fully paid, or security given for the same to the satisfaction of the vendor's agents.

There again, I think, it is contemplated that everything that has been bought shall be removed. Condition 7, which is the most important one, C is as follows: "All lots to be cut and cleared from the estate by Mar. 25, 1935." Pausing there, it seems to me that that imposed an obligation upon the defendants to cut and clear their lots from the estate by that date. I ought to say that by a special condition the date was extended to Mar. 25, 1936. Mr. Stenham has argued that that merely states a limit D to the period during which the defendants are to be at liberty to come upon the premises. I do not so read it. If the purchasers buy subject to conditions of sale, one of which is that all lots "are to be cut and cleared from the estate by Mar. 25, 1936," I can read that only as imposing an obligation. Then Condition 7 continues: E

> If any timber is not removed by the above date the purchaser shall become liable for any damage that may be occasioned to the vendor or his assigns, by reason of such non-removal; the damage or loss so sustained shall be arrived at by the manner hereunder provided for in cl. 8.

Before commenting on that, I shall read the relevant portions of cl. 8: F

> The lots after sale to be at the risk of the purchasers and not the vendor or the occupier of the land, and the respective purchasers are to be answerable for injury.

Then various matters are specified, and cl. 8 provides:

> or any other damage herein particularly expressed the amount of the damage if not agreed shall be determined by Mr. George Herbert [of a certain named firm] and such satisfaction as he shall adjudge shall be final and be immediately paid to the vendor's agent. G

Mr. Stenham argued that the word "timber" in that portion of the condition refers only to timber in its technical sense, of the trunks or boles of the trees. I do not feel at all disposed to assign that particular H meaning to the word. I think that "timber" in that provision simply means the same as "trees." I think that it had been used in that sense, broadly speaking, throughout these conditions, and I cannot conceive why it should be provided that the purchasers shall be liable if a certain portion of their purchase is not removed by a particular date, but apparently, according to Mr. Stenham's contention, shall not be under any liability if a certain other portion of their purchase is not removed by that date. I think that "timber" in that clause is used quite generally to mean that which has been purchased. Further, even if I were to give a more limited meaning to the word "timber," I should still be of opinion, as regards the provisions of the first sentence of cl. 7, that if the tops and lops were not removed by the specified date, there would be a breach of contract, for which the defendants would be liable in damages, although, on that reading of the conditions, there would be no provision made as to how that damage was to be assessed. Then cl. 9, which again throws some light upon the use of the word "timber," is as follows:

> If any purchaser shall make default in payment of the balance of his purchase money and shall have removed the timber purchased by him from the premises such timber, or any part thereof, shall at any time or in any place wherever the same shall be found, be lawfully seized by the agents of the vendor, and be sold to make good such deficiency of payment and all expenses attending such seizure and resale.

I do not see why the word "timber" there should have a meaning more limited than that timber which was bought by the purchasers. I need not, I think, go through the rest of these conditions. I think that Condition 11 is again an illustration of the fact that the word "timber" is really used in this particular contract, however it may be used in other contracts, or generally in the trade, as synonymous with the trees purchased. The special conditions extend the time for clearance in Condition 7 to Mar. 25, 1936, and give certain other rights in regard to using sites for the storage and conversion of felled timber. There is a proviso to special condition No. 5, which I should read:

> Provided always and it is hereby expressly agreed that if the vendor or his successors in title and assigns owner or owners for the time being of Doles House shall give to the purchasers 28 days' notice at least, terminating this licence [certain results shall follow].

I think that it appears from this provision, which I have just read, and from certain other parts of the conditions which I have already read, that it was contemplated under this contract that the vendor might assign the benefit of it to some other person. There is no dispute that all the trees bought were cut down, and all the trunks or boles removed, before Mar. 26, 1936. There is equally no dispute that large quantities of tops and lops remained on the various lots after that date. I shall return to the history of these tops and lops later.

That being the contract between Mr. Thomas Place and the defendants, I must now refer to the documents under which the plaintiff, as he says, became entitled to enforce this contract. The plaintiff agreed to buy certain land, the trees on which were included in lots 2, 3, 4, 5 and 12 in the sale to the defendants, by an agreement of sale dated Oct. 26, 1933. I refer to that only because Mr. Harman, for the plaintiff, contended that, if there were any defect in any of the subsequent assignments, that would constitute an equitable assignment of the benefit of the agreement. The plaintiff had the rights in respect of that land conveyed to him by a vesting deed, dated Nov. 11, 1933, made between Thomas Place, of the first part, Charles Stephen Bine Renshaw, of the second part, and the plaintiff, of the third part, whereby Mr. Place, described as "the vendor," as beneficial owner conveyed unto the purchaser, putting it shortly, the land comprising lots 2, 3, 4, 5 and 12 : A

> and excepting and reserving unto the vendor and his successors in title and assigns all timber and timber trees now standing and growing on the property secondly hereby conveyed [that is, lots 2, 3, 4 and 5].

Then there is an immaterial exception out of that, after which the vesting deed proceeds : B

> Together with the rights and subject to the obligations and provisions in respect of felling and removing the same contained in a contract relating to part of the property hereby conveyed dated Sept. 6, 1933, and made between the vendor of the one part and Homewood Sawmills, Ltd., of the other part.

Counsel for the defendants concedes that these words "together with," C although at first sight they might seem to form part of the exception, in fact form part of what was conveyed. In my view, that conveyance was effective to confer upon the plaintiff the rights in regard to the lots specified in that vesting deed, which he claims to be able to enforce in this action, or, rather, I should have said that it vests in the plaintiff all D the rights of Mr. Thomas Place under the contract of Sept. 6, 1933, other than the right to receive the purchase money. Then, on May 17, 1934, the plaintiff agreed to buy the land on which the trees, described as lots 1, 6, 7, 8, 9 and 13, stand, and, by a further vesting deed in similar terms, dated July 12, 1934, that land was conveyed to him, together with the E rights under that contract, except the right to receive the purchase money. The result was that, as regards lots 1, 2, 3, 4, 8 and 9 on the plan attached to the conditions of sale, to which I have referred, the soil passed to the plaintiff, and, in my view, there passed to him also the rights under the contract of Sept. 6, 1933, in respect of these lots, other than the F right to receive the purchase money, while the defendants had their rights in respect of these six lots under the contract of Sept. 6, 1933. Mr. Stenham has argued that such an assignment as this was impossible, but for my part I see no reason why such an assignment should not be validly made. In this connection I have been assisted by the cases of G *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (1) and *Dawson* v. *Great Northern & City Ry. Co.* (2). I do not think that the cases cited by Mr. Stenham with regard to the assignment of a part of a debt cover the case which I have now to consider.

As I have said, some of the tops and lops were not removed before H Mar. 25, 1936, and there is another question of law which has arisen in the case, and that is whether, in the circumstances of this case, the property in these tops and lops reverted to Mr. Place or to the plaintiff as his successor in title. In my view, there are no facts which would found any such reverter. I think that the position was that the tops and lops remained the property of the defendants, although they could not, without the consent of the plaintiff, go on to the land to remove them. I think that this view is supported by the decision of the Court of Appeal in *Ellis* v. *Noakes* (3). Any acts or omissions by the defendants since that date which might otherwise have been regarded as some evidence of an intention to abandon would, I think, be sufficiently explained by the fact that they had no right whatever to go upon the plaintiff's land to deal with the tops and lops.

The subsequent history of the case I can deal with, I think, quite briefly. On Nov. 25, 1935, the plaintiff wrote to the defendant company :

> Dear Sirs, As you have no representative here now having I understand sold your tree tops to various people—I think perhaps it is only fair that I should advise you that at the pace the work is being done at present I can see no chance of them having cleared the wood by Mar. 24 next, also the rides (which you had left in fairly good order with your tractors) are now being cut to ribbons—so it will be essential for you to have these men out of the wood some time before Mar. 24 in order to give you time to make good the damage. Probably you have made arrangements to send some of your own men down to speed up the work of clearance when you see that it has got too much in arrear ; but in case you have not done so I am sure that you will appreciate that I am only writing you so that you shall have ample time to arrange to do so. Owing to my pheasants' nesting I must insist on the wood being cleared and the rides put in order by Mar. 24 and can under no circumstances grant an extension of time.

That was, of course, a plain warning that the work had got to be done by Mar. 24, 1936. There was about this time an interview between the plaintiff and a Mr. Baldwin (an official of the defendant company), a Mr. Willson and another gentleman, at which the matter was discussed. In my view, neither at that interview nor at any subsequent time prior to the breach was it made plain to the plaintiff—if, indeed, it was the fact—that the defendants abandoned all their claim to the ownership of the tops and lops. I need not read the letters which follow. The position was, in the end, that Mar. 25, 1936, came, and the tops and lops to a very large extent had not been removed from the land. The defendants' attitude on the correspondence was that they were under no liability to remove tops and lops, that they had committed no breach of their contract, and that therefore the provision in regard to arbitration had never come into force. The plaintiff apparently attempted to have an arbitration carried out, but, owing to the defendants' attitude, nothing satisfactory came of that, and ultimately the plaintiff issued his writ on Oct. 20, 1936, in which he claimed certain sums by way of damage, and also damages generally.

Viewing the evidence as a whole, I have come to the conclusion that a fair figure to award by way of damages is the sum of £150.

Judgment for the plaintiff for £150 *with costs.*

Solicitors : *Frere, Cholmeley & Co.* (for the plaintiff) ; *Samuel Sebba* (for the defendants).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

SQUARE *v.* MODEL FARM DAIRIES (BOURNEMOUTH), LTD.

[KING'S BENCH DIVISION (Lewis, J.), **May 3, 4, 5, 6, 9, 10, 1938.]**

Food—Infected milk—Breach of warranty—Action for damages—Whether remedy restricted to penalty—Food and Drugs (Adulteration) Act, 1928 (*c.* 31), *s.* 2.

S. arranged with the defendants, who were large distributors of milk, to supply him, his family and household with milk. In August, a serious outbreak of typhoid fever occurred. S.'s wife, two children, his niece and governess contracted the disease, and S. himself, though escaping typhoid, was incapacitated for some little time through inoculation. Before they commenced to supply S., the defendants wrote asking him to deal with them, and enclosed a brochure describing the way in which they carried on their business, and in particular the care taken to insure a pure supply of milk, which was stated to be mainly produced on their own farm. It was proved at the trial that, during the summer season, they drew the greater part of their supplies from a large number of other farms, most of the milk being mixed together, at the defendants' distributing depot, before being delivered to customers. For the purpose of the trial, it was admitted that the infection was carried in the milk supplied by the defendants. The plaintiffs founded their actions not only upon negligence, but also upon the breach of the statutory duty imposed by the Food and Drugs (Adulteration) Act, 1928, s. 2, which requires sellers of food to supply food of the nature, substance and quality demanded :—

HELD : (i) the defendants were not guilty of negligence at common law.

(ii) though the defendants had no means of knowing that the milk was infected, there had been a breach of the statutory duty under the Food and Drugs (Adulteration) Act, 1928, s. 2, for which they were liable in damages.

[EDITORIAL NOTE. The allegations of negligence not having been proved, the substantial question in this case was whether the plaintiffs could recover damages for the breach of statutory duty under the Food and Drugs (Adulteration) Act, 1928, s. 2. Upon this point it was contended that the remedies were confined to summary proceedings indicated in the statute, and that an ordinary action for damages was not maintainable in respect of the breach of statutory duty. It was held that the remedies were not so restricted, and that the plaintiff was entitled to recover in an action for damages.

AS TO ADULTERATION OF MILK, see HALSBURY, Hailsham Edn., Vol. 15, pp. 208-211, paras. 383-389 ; and FOR CASES, see DIGEST, Vol. 25, pp. 126-131, Nos. 474-512.]

Cases referred to :

(1) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.

(2) *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q.B. 402 ; 42 Digest 759, *1858* ; 67 L.J.Q.B. 862 ; 79 L.T. 284.

(3) *Monk* v. *Warbey*, [1935] 1 K.B. 75 ; Digest Supp. ; 104 L.J.K.B. 153 ; 152 L.T. 194.

(4) *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832 ; 42 Digest 870, *197* ; 93 L.J.K.B. 5 ; 129 L.T. 777.

(5) *David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146 ; 34 Digest 219, *1816* ; 78 L.J.K.B. 659 ; 100 L.T. 678 ; *on appeal*, [1910] A.C. 74.

(6) *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441 ; 42 Digest 759, *1850* ; 46 L.J.Ex. 775 ; 36 L.T. 761 ; *revsg.* (1871), L.R. 6 Exch. 404.

(7) *Gorris* v. *Scott* (1874), L.R. 9 Exch. 125; 42 Digest 759, *1853*; 43 L.J.Ex. 92; 30 L.T. 431.

(8) *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K.B. 608; 39 Digest 445, *733*; 74 L.J.K.B. 386; 92 L.T. 527.

(9) *Daniels* v. *Vaux*, [1938] 2 All E.R. 271; Digest Supp.

(10) *Sandys* v. *Small* (1878), 3 Q.B.D. 449; 25 Digest 83, *113*; 47 L.J.M.C. 115; 39 L.T. 118.

(11) *Brown* v. *Foot* (1892), 61 L.J.M.C. 110; 25 Digest 82, *104*; 66 L.T. 649.

(12) *Parker* v. *Alder*, [1899] 1 Q.B. 20; 25 Digest 81, *97*; 68 L.J.Q.B. 7; 79 L.T. 381.

(13) *Goulder* v. *Rook*, *Bent* v. *Ormerod*, *Lee* v. *Bent*, *Barlow* (*or Palmer*) v. *Noblett*, [1901] 2 K.B. 290; 25 Digest 80, *96*; 70 L.J.K.B. 747; 84 L.T. 719.

CONSOLIDATED ACTIONS by the plaintiff and various members of his family and household for damages in respect of illnesses contracted through drinking milk supplied by the defendants and containing typhoid germs. The facts and arguments are fully set out in the judgment.

Norman Birkett, K.C., and *H. H. Maddocks* for the plaintiffs.

R. P. Croom-Johnson, K.C., and *L. C. Graham-Dixon* for the defendants.

LEWIS, J.: On Jan. 26, 1937, by writ 1937 S. No. 290, Alwyn Holberton Square commenced an action against the Model Farm Dairies (Bournemouth), Ltd., in which he claimed damages against the defendants for breach of warranty, and, alternatively, for negligence, in consequence whereof he was supplied by the defendants with milk infected by typhoid germs. The statement of claim in that action was delivered, and the defence was filed on Mar. 22, 1937. In June, certain interrogatories were answered by Mr. Long, who is the managing director of the defendant company, and is, in fact, the company.

By writ 1937 S. No. 3477, on Oct. 29, 1937, Mrs. Square, two of her children, her niece, the lady governess (all of whom were members of Mr. Square's household at all material times) and a Mrs. Bassett, who was Mr. Square's sister, commenced an action against the same defendants, in which they claimed damages for negligence, for fraudulent misrepresentation, and for breach of statutory duty in and about the sale of milk in Aug., 1936. The statement of claim in that action was delivered on Oct. 30, 1937, and the defence was delivered on Nov. 25, 1937.

On Nov. 11, 1937, there was an amendment of the statement of claim in Mr. Square's action, the amendment being the addition of a claim for damages for fraudulent misrepresentation and for breach of statutory duty. The defence in that action was in consequence amended, and then an order was made for consolidation of the two actions, and that is how the matter comes before me.

To use the words of Mr. Norman Birkett, who appeared for the plaintiffs in the consolidated action, this is a terribly serious case. It is a claim for damages for the injuries and the loss which are alleged to have been sustained by the plaintiffs owing to an outbreak of typhoid fever in Poole and Bournemouth and the neighbourhood in Aug., 1936.

Not only is it serious for the plaintiffs, who, it is said, have suffered damage in consequence of that outbreak, but it is also serious for the defendants, who are distributors of milk in that neighbourhood, and who up till then had carried on a business successfully, and borne the highest reputation as sellers of clean, high-grade milk. It was by milk sold by them to Mr. Square for the use of his family and household that the typhoid was carried which caused the illnesses of those plaintiffs who suffered from typhoid fever. It is, of course, a very serious case for the defendants.

The facts, as I find them, are these. Mr. Square was minded to spend his holidays in Aug., 1936, at Poole, and, accordingly, in May, 1936, he took a house known as "Suntrap," Panorama Road, Sandbanks, Poole, for his family and household for August. In May, 1936, he was sent a little booklet which was accompanied by a letter, the letter being dated May 28, 1936, from the defendants. The letter merely asks that Mr. Square will, when he comes into residence at Sandbanks in August, deal with the defendants as milk distributors or milk sellers. The letter states that, owing to the hygienic conditions under which the milk is produced and bottled, a very high standard of purity and cleanliness is able to be maintained, and the booklet, which contains photographs and some letterpress, is to the effect that the Model Farm Dairies (Bournemouth), Ltd., produce and distribute clean milk. It sets out that, owing to the system that they employ, they are able to maintain the cleanest and safest supply of milk in the district. It is, of course—I do not use the word offensively at all—a "puff" of the methods of the defendants, and, as I have already said, the defendants had a well-deserved reputation for their methods and cleanliness, and the purity of their milk.

Unfortunately, in August certain members of Mr. Square's household at "Suntrap" contracted typhoid. Mrs. Square, the mother, Mr. Square's wife, was taken ill on Aug. 28, 1936, and was not discharged from hospital until Nov. 8. She was undoubtedly very ill, and unfortunately she is still suffering from the effects of that illness, and has by no means recovered. The daughter, who was then 11 years of age, became ill with typhoid on Aug. 28, and she was discharged from hospital on Oct. 25. The boy, who was then 7 years of age, was taken ill on Aug. 31, and was discharged from hospital on Oct. 14. The niece, who is the daughter of the plaintiff, Mrs. Bassett, developed typhoid fever on Aug. 25, and she was discharged on Oct. 17. Those three children have, fortunately, completely recovered from the effects of typhoid fever. The other lady who suffered from typhoid fever was a Miss Balthasar, the lady governess. She developed typhoid fever on Aug. 31, and was discharged on Oct. 7. She has not wholly recovered, but her condition is very considerably better than that of Mrs. Square.

Mr. Square did not contract typhoid fever, but, when the outbreak had taken place, he took the precaution of being inoculated against typhoid, which successfully averted an attack of typhoid fever, but he told me, and of course I have no reason whatever to doubt him, that unfortunately he took the inoculation rather badly, and for some 10 or A 14 days was decidedly ill as a result of the inoculation.

Mrs. Bassett, the mother of Elizabeth Bassett, was not a member of the household, and the only reason why she claims in this action is that she says, as is the fact, that she had certain expenses over the illness of her daughter, and she claims to recover from the defendants the B expenses which she thus incurred.

All those in the household who became ill with typhoid fever had drunk milk supplied by the defendants, and it was conceded, and quite rightly conceded, by Mr. Croom-Johnson, who appeared for the defendants, that, for the purposes of this case at least, it was from this C milk that the infection arose.

The defendants have a large number of shops and one central depot, and at all material times some 1,600 gallons of milk were dealt with at that depot, of which some 300 were produced on the defendants' model farm at Knighton. During the holiday season, more milk was required D for the consumption of visitors than was required at other times of the year, when the resident population only had to be supplied.

The milk which caused the trouble in this case was milk from a smallholding, part of the Merly Hall Farm, which supplied daily a small proportion of the 1,600 gallons dealt with by the defendants. This milk E was a regular supply, and not milk obtained because of the increase in the amount required for the supply of visitors. Of the 37 outside suppliers who sent their milk to the defendants, 22 were regular suppliers, and of these the smallholder above referred to was one.

The outbreak was a serious one. In Poole alone there were some F 205 cases of typhoid. The Ministry of Health caused an inquiry to be made, and two very experienced gentlemen, one of whom unfortunately is now dead, went down and prosecuted inquiries as to the source of infection. The gentleman who is now deceased, Dr. Vernon Shaw, made a report to the Minister. The inquiry did not take the form of G a public inquiry, such as that which took place lately at Croydon. No witnesses were examined or cross-examined, but the gentlemen referred to, quite properly, made inquiries of people in the locality, and reported the result of those inquiries to the Minister, together with the conclusions drawn therefrom. The conclusion reached as a result of those H inquiries was that the infection arose in this way, and this was admitted by the defendants. Merly Hall Farm was a farm which some years ago was purchased by the Dorset County Council and split up into five smallholdings. Through two at least of these smallholdings there flowed a stream, flowing from south to north. Mr. Newman was the smallholder who owned the cows whose milk was in fact the infected milk. Some

80 yds. south of his southern boundary, sewage was discharged into the stream, and was carried downstream until it reached that portion of the stream at which the cows sometimes drank, and in which in hot weather undoubtedly they occasionally stood. That sewage was sewage from a house where, unfortunately, there was staying, or in which there had been staying, a typhoid carrier, who was entirely unconscious of that fact, and as a result the bacillus typhosus appeared in the effluence discharged into the stream.

I have read the report, and the facts contained in it, and those facts were admitted, subject to certain reservations, by Mr. Croom-Johnson, the chief of which reservations appears in the second paragraph on p. 11 of the report, and deals with various details and alleged happenings during the illness of Mrs. Newman, who in fact died of enteric fever on Sept. 7, 1936. Her infection arose from the same source as that of the plaintiffs in this action who suffered from typhoid. Mr. Newman did not know, until he saw it on her death certificate, that the illness from which his wife had suffered was typhoid. I saw and heard Mr. Newman in the witness-box, and I am satisfied beyond all doubt that there is not the slightest ground for suggesting that he did not take the greatest possible care to see that the milk supplied by him was clean. His buildings were good, his herd was healthy, and his methods were beyond reproach as regards washing and the cleanliness of his milking-utensils and his own personal cleanliness. He did the whole of the work on the farm himself.

Merly Hall Farm had, previous to the purchase by the county council, been farmed as a dairy farm for many years, and not only had the herd in those days drunk at this stream, but also, before wells were sunk, the human population in the district had drunk at the stream, apparently without any ill effects. Mr. Newman could not possibly have known, and there was no reason to suspect, that the stream was infected. There was no discoloration of the water where the stream flowed through his holding, and it is not without interest to note that, when samples were taken 80 yds. upstream from his holding at the point where the sewage discharged into the stream, no bacillus typhosus was found until Oct. 16, 1936. Previous samples which had been taken were entirely negative on examination, and the examination was of the most scientific character, carried out by experts.

Mr. Newman was a licensed producer of accredited milk, which involved not only a quarterly veterinary examination of his herd but also an inspection of his buildings by the competent authority. He had been a licensed producer since Michaelmas, 1935, when he took over the farm.

I also saw in the witness-box Mr. Long, the defendants' managing director, who also gave evidence before me, and I am satisfied that he was a truthful witness. Unfortunately, through a misapprehension, he had answered an interrogatory in such a way as to make it appear that the evidence which he gave in the witness-box was entirely incorrect. The interrogatory referred to was No. 12, and was in these terms:

> Before obtaining supplies of milk from the said farms [the 37 other farms which supplied milk to the central depot of the defendants], did you make any inspections thereof, or inquiries as to the possibility of the cows gaining access to land or water which might be polluted with sewage and as to the conditions under which milk was produced thereon ?

To this interrogatory Mr. Long answered:

> No. The defendants always rely on local authorities, particularly the county council who own the said farms, dealing with possible pollution.

That answer, or the first word of it—namely, "no"—was the most damning admission on the part of Mr. Long, but I have heard what he had to say about it in the witness-box, and I am quite satisfied that he, foolishly, entirely misinterpreted that interrogatory. He thought that what he was being asked was whether or not he had inspected these farms, and particularly, or course, the farm of Mr. Newman, with regard to the question of pollution of the water. It seems incredible that Mr. Long should have made that mistake, but, on the other hand, he obviously was a very troubled man at this time, and I accept his statement that, when he made that damning admission, he had not appreciated what the question was, and that the true answer was the answer which he gave to me in the witness-box in his evidence. All his life Mr. Long apparently had been an enthusiastic apostle of clean milk. He had twice obtained the certificate of merit in competition for the county of Dorset. He knew personally every one of the farms and farmers of the 37 outside suppliers. He had inspected them, and was conversant with the men and their methods, and, in so far as inspection is concerned, there was nothing more, in my judgment, that he could have done.

The fact that he inspected Merly Hall Farm was corroborated by Mr. Newman, and I am quite satified that, when he said "no" to Interrogatory No. 12, he did not appreciate that he was being asked whether he had made general inspections, other than particular inspections as to the question of pollution of the water.

The milk from all the sources went to the central depot. There, according to the immediate demand and the times at which the milk arrived at the depot, the milk of one farm was mixed with the milk of another farm, or perhaps with that of other farms, in the one container or vessel, which held 200 gallons. All the milk so mixed or bulked was accredited milk, obtained from licensed producers. Not only did Mr. Partridge, the manager of the United Dairies, Bailey Gate depot, speak in terms of the highest praise of the defendants' methods, but the Medical Officer of Health, who was called by the plaintiffs, in so far as the sphere of his activities was concerned, could find no fault.

At the close of the case, a submission was made to me that there was no evidence of fraudulent misrepresentation. I heard arguments thereon, and I was satisfied that there was no evidence fit to be considered, or fit to be left to a jury, on the charge of fraud. It is to be observed that it was not until after June 4, when that answer of Mr. Long's was given, that the second action was brought, the first charge of fraud, and the first action was amended in order to contain a charge of fraud. Even if the interpretation which is sought by the plaintiffs to be put upon the statements in the booklet is the right one, I am satisfied that there is no evidence fit to be considered that they were untrue, far less that they were untrue to the knowledge of the defendants. For that reason, I held that there was no evidence on the charge of fraud.

With regard to the charge of negligence, it is easy to be wise after the event, but, bearing in mind that " negligence " means the doing of something which a reasonable man would not do, or failing to do something which a reasonable man would do, I have come to the conclusion that there is no evidence of negligence in this case. There was thoroughly efficient inspection and supervision. The bulking of milk is not, in my view, negligent, assuming, of course, that the milk which is bulked is accredited milk, not mixed with milk of an inferior quality. The business of milk distributors would, in my view, be commercially impossible unless milk were bulked. Indeed, it would appear that, if it is negligent to bulk accredited milk which comes from different farms, it is equally negligent to bulk the milk from one cow on an accredited farm with the milk from another cow on the accredited farm. I have considered carefully the evidence which has been given, and I am satisfied that there is no evidence whatever of negligence in this case. That being so, the attempt to bring this case within the principles of *Donoghue's* case (1), the case of the snail in the bottle, fails, because in that case it was held that there had been negligence; and therefore the principles of *Donoghue's* case (1), in my view, do not apply.

However, there was another cause of action—namely, the cause of action under the Food and Drugs (Adulteration) Act, 1928, s. 2. That Act is a consolidating Act, and sect. 2 re-enacts, almost in identical words, sect. 6 of the Act of 1875. Sect. 2 reads :

> (1) No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, or not of the substance, or not of the quality, of the article demanded by the purchaser.

I was told by counsel on each side that the point was a novel one, and that, in their experience, and as a result of their researches, no case had been found in which a purchaser, or a person prejudiced by the sale of goods containing poisonous or deleterious matter, had relied upon this section.

It is clear, however, that an action will lie for the breach of a statutory duty, even though the statute which creates that duty imposes a penalty for its breach. There are, of course, a number of reported cases which exemplify this, one of which is *Groves* v. *Wimborne* (*Lord*) (2), and one of the latest authorities dealing with this question is *Monk* v. *Warbey* (3), which was before the Court of Appeal, in which Greer and Maugham, L.JJ., reiterated the principles.

In the course of his judgment, GREER, L.J., said, at pp. 81, 82:

The only other case I propose to refer to is *Phillips* v. *Britannia Hygienic Laundry Co.* (4), but before citing a passage from it I desire to say first that it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the *ratio decidendi* of the case. In this class of case it does not seem logical to say that unless you can find in the Act provisions specifically intended for the benefit of an individual or described class of persons no action will lie for a breach of a statutory provision where penal consequences are imposed for its breach. I prefer the view expressed by ATKIN, L.J., in the case I have just cited, where he said [at p. 841]: " One question to be considered is, does the Act contain reference to a remedy for breach of it? *Prima facie* if it does that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals. Instances of this are *Groves* v. *Wimborne* (*Lord*) (2) and *David* v. *Britannic Merthyr Coal Co.* (5). To my mind, and in this respect I differ from MCCARDIE, J., the question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public." What therefore has to be considered here is, taking the whole of this Act, is there anything in it to show that an injured person is outside its scope?

At pp. 84, 85, MAUGHAM, L.J., said:

The authorities which have been cited in the able argument for the appellant show that *prima facie* the rule is that where there is a breach of a statutory duty resulting in damage to an individual an action for damages will lie. This *prima facie* rule, however, is subject to exceptions. In particular, where the statute gives a special remedy for a breach of the duty it creates, the special remedy may be the only one available. In such a case, therefore, a person who has been injured by the breach of the duty has no right of action for damages. The statute we are considering provides by sect. 35 (2) for the possibility of a fine and imprisonment imposed upon a person contravening subsect. (1), and for the possibility of his disqualification for holding or obtaining a licence. At various times, doubts have arisen as to the circumstances which will enable the court to determine whether or not in any particular case there can be a remedy other than or in addition to the special remedy provided by the Act. The intention of the legislature is to be gathered from the particular Act under consideration, and I doubt whether anything more lucid can be found on the subject than in the passage in LORD CAIRN'S judgment in *Atkinson* v. *Newcastle Waterworks Co.* (6) I think, however, one may say this that if the Act provides a special remedy for a contravention of its provisions the *prima facie* rule is that that is the only remedy, and the question whether that rule applies in any particular case depends upon the purview of the legislation and the language employed. The court has sometimes resolved that question in one way and sometimes in another. In *Phillips* v. *Britannia Hygienic Laundry Co.* (4) this court held that it was not intended by the order there in question that everyone who might be injured by its breach should have a right of action for damages. Like GREER, L.J., I think that the principle stated by ATKIN, L.J., in that case was correct, and that the question whether the Act or order is intended to give or to exclude a private remedy as the Lord Justice said, " is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public " [p. 841]. The strongest case on the other side is *Groves* v. *Wimborne* (*Lord*) (2). The cases show that there are certain considerations for determining whether the intention of the statute is to preclude private remedy. First, the court has to make up its mind whether the harm sought to be remedied by the statute is one of the kind which the statute was intended to prevent; in other words, it is not sufficient to say that harm has been caused to a person and to assert that the harm is due to a breach of the statute which has resulted in injury. A good instance of that is to be found in *Gorris* v. *Scott* (7), where sheep were washed overboard by reason of the defendant's neglect to take a precaution required by an order of the Privy Council made under the authority of an Act. The court took the view that the object of the Act and the order being to prevent the spread of contagious disease among animals, and not to protect them against perils of the sea, the plaintiff could not recover. The second consideration which strongly tends to support the view that this statute was not intended to preclude civil action is that it is brought by

> a person pointed out on a fair construction of the Act as being one whom the legislature desired to protect. That kind of consideration affected this court in *Groves* v. *Wimborne (Lord)* (2).

I have read those passages from those judgments because it appears to me, with the greatest respect, that they most clearly set out the principles which have to be applied, and, applying those principles to the best of my ability, it seems to me that the Food and Drugs (Adulteration) Act, 1928, was not intended to preclude a civil action by a person whom the legislature desired to protect. Mr. Croom-Johnson has argued that this is not so, and amongst other reasons which he gives is the reason that the legislature cannot have intended to give the purchaser a right of action by this statute, because he already had a right of action under the Sale of Goods Act, and he referred me to sect. 14 of that Act.

It is under that section that Mr. Square makes his claim in the first action, which is his action, and under which he is entitled to recover in this action, as was conceded by Mr. Croom-Johnson. That section reads as follows :

> Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows : (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose . . .

In order to recover under that section, the plaintiff has to prove that he made known to the seller the particular purpose for which the goods were required, so as to show that he relied on the seller's skill and judgment.

There was in *Frost* v. *Aylesbury Dairy Co.* (8), and there is in this case, abundant evidence that the purpose was made known, so as to show that the buyer relied on the seller's skill, but I could well imagine cases in which the purchaser would be in a difficulty in establishing that fact. If there is a right of action under the Food and Drugs (Adulteration) Act, 1928, s. 2, the plaintiff would not have to prove this, and I therefore think that it cannot be said that the right of action given by the Sale of Goods Act is the same as that which I hold is given by the Food and Drugs (Adulteration) Act, 1928, s. 2.

It was further argued that, if a right of action is given, it is given only to " the purchaser," and the fact that in the section the words " the purchaser " appear, and not the words " a purchaser " or " a person prejudiced," point to that conclusion. Upon the construction of the section, however, I think that that is too narrow a view, and that anyone who suffers damage owing to the sale of food or drugs of a quality inferior to that of the food or drugs which the seller has been asked to sell has a right of action. Of course, he must show that he has been damnified. As Humphreys, J., said in *Daniels* v. *Vaux* (9), at p. 277 :

> It would be wasting time and breath to discuss the question as to whether a

> member of the public can bring an action for damages against a person merely because he has broken the law. Of course he cannot. He has to show that he himself has been damnified in some way by the result of such breach.

Also he must show that there has been a breach of statutory duty by the seller, and one of the questions to be determined, therefore, is this: Could the defendant company have been prosecuted under sect. 2 of the Food and Drugs Act, in the circumstances and on the facts which I have above set out? There was some discussion about this. The presence of the bacillus typhosus in the milk was entirely unknown to the company. It was not placed there by them, they did not know of its existence, nor could they have known of it. The opening words of the judgment of COCKBURN, C.J., in *Sandys* v. *Small* (10), a case in which a similar section—namely, sect. 6 of the Act of 1875—was considered, were these, at p. 452:

> I should be very sorry to diminish the efficacy of a very useful Act, intended to protect the public from frauds committed by the sellers of the articles to which the Act relates, but we ought, if possible, to construe the words of the Act so as not to interfere with due freedom of dealing between the seller and the purchaser, and not unfairly to prejudice either party. I think we should be doing so if we held its provisions to apply to cases such as the present, where both parties perfectly well know what they are dealing with. The provisions of the Act were intended to apply to adulterations of a clandestine character, which operate to the prejudice of the purchaser.

Those words would seem to suggest that there must be an intentional adulteration, if not a fraudulent one.

The later authorities show that an innocent employer is guilty of an offence under this section even though he can prove that the milk has been adulterated by his servant without his knowledge. That is the case of *Brown* v. *Foot* (11). In *Parker* v. *Alder* (12), a case under the same section, where milk had been adulterated by a complete stranger to the vendor and without his knowledge, LORD RUSSELL OF KILLOWEN, C.J., said, at p. 25:

> It has been decided in *Brown* v. *Foot* (11) in the clearest manner that an innocent vendor of milk is undoubtedly liable for the unauthorised act of his servant in adulterating it. It becomes, therefore, at once apparent that there is really no material difference between this case and that, because a vendor is no more able to prevent the adulteration by a dishonest servant than he is to prevent adulteration by strangers such as the servants of the railway company.

He went on to say that, looking at the object of the Act, it could not be doubted that an offence had been committed.

This also was the view, apparently, of LORD ALVERSTONE, C.J., expressed in *Goulder* v. *Rook* (13). In that case, a quantity of arsenic had been mixed, in the process of manufacture, accidentally and in ignorance, with beer, and the beer was sold by a retailer without knowledge or reasonable grounds for suspicion of the presence of the arsenic in the beer. After dealing with sects. 3 and 6 of the Act of 1875, sections which, as I have said, correspond with sects. 1 and 2 of the Act of 1928, he said, at p. 297:

> It has been suggested that if what is in the article is the result of some ingredient put into it in the course of its manufacture which in fact makes it injurious to health, that it can only be a "mixing" under sect. 3, and that the offence can only fall within the terms of that section. The penalty is very much more severe under

sect. 3, and knowledge is made of the essence of the offence—that is to say, the defendant is not convicted of an offence if he proves that he did not know, and had no means of knowledge, that injurious ingredients had been mixed with the article. Under sect. 6 the penalty is less, and it has been expressly decided in two or three cases that the knowledge of the person charged is immaterial—that is to say, however innocent, however little he may have known, yet he may be convicted under sect. 6.

I am therefore of opinion that, although the company were innocent A morally, they were guilty of a breach of their duty under the section. What was asked for was pure, clean milk. The article supplied was not of that quality, and, for the reasons above given, I think that the plaintiffs, with the exception of Mrs. Bassett, are entitled to recover damages. She incurred certain expenses in connection with the illness of her infant B daughter, and Mr. Croom-Johnson has taken the point that she was under no obligation to provide for her daughter, in that her husband is alive, and that the obligation of maintaining the daughter rests upon him. She in fact divorced her husband, but I have had no evidence as to the arrangements, or any orders which were made as to the mainten- C ance of this child, and I am reluctantly compelled to say that the point taken by Mr. Croom-Johnson is a valid one.

It only remains for me to assess the damages which I hold that the plaintiffs, other than Mrs. Bassett, are entitled to recover, the damages to be recovered on the ground of breach of warranty and breach of D statutory duty under the Food and Drugs Act, but not damages for fraud or for negligence.

Mr. Square has had considerable expense put upon him by reason of this outbreak in his family and household. I think I am right in saying, if my recollection is accurate, that the whole of his household went down E with typhoid except himself, one servant, and one of his twin boys, and I think that the proper amount to award him for the loss that he suffered in consequence of these matters is the sum of £400.

With regard to Mrs. Square, she has not yet recovered from the illness, and I think that the amount she should recover is £250. The boy was F ill for a comparatively short time, and has now completely recovered, and I think that the amount of £50 is sufficient to satisfy his claim. With regard to both the girls, the girl and the niece, they were ill for a little longer, and I think that the amount which would satisfy them is £60. With regard to the governess, she not only was ill, but also had G certain expenses, which are set out in the statement of claim, and, amongst other things, she was apparently engaged at some school, and missed a term in consequence of her illness. I think that her damages should be put at £105. Mrs. Bassett, in my view, having regard to the points which have been taken by Mr. Croom-Johnson, is not entitled to H anything. There must be judgment for those sums accordingly.

Solicitors: *Clarke, Square & Co.* (for the plaintiffs); *Peacock & Goddard*, agents for *Mooring Aldridge & Haydon*, Bournemouth (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WINDSOR *v.* CHALCRAFT.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **May 9, 1938.**]

Practice—Application by insurance company to set aside judgment—Running-down action—Judgment in default of appearance of defendant—Notice given to underwriters that writ had been issued—No notice that writ had been served, or action set down for trial—Road Traffic Act, 1934 (c. 50), *s.* 10—*R.S.C., Ord.* 27, *r.* 15.

The plaintiff in a running-down action notified the defendant's insurers that he had issued a writ against the defendant. The defendant entered no appearance, and judgment was obtained against him by default, and a summons taken out for the assessment of damages before a master, on which occasion the defendant again made no appearance. No notice was given to the insurers that the writ had been served, or that the case had been set down for trial. The insurers applied to have the judgment set aside :—

HELD (SLESSER, L.J., dissenting): they were persons who had been injuriously affected by the judgment, as they were under a statutory liability to pay the plaintiff the amount of the judgment. They were therefore entitled to be heard, and the judgment ought to be set aside.

[**EDITORIAL NOTE.** The powers of the court to set aside a judgment in default of appearance are here extended to setting aside such a judgment at the instance of an insurance company, who were not parties to the action, but who might be liable to satisfy the amount of the judgment. It is well known that by virtue of the Road Traffic Act, 1934, s. 10, insurance companies are liable to satisfy the judgments awarded against their policyholders in certain circumstances. In the present case the policyholder had taken no steps in the action whatever, nor had he notified the insurers of the action. They had, however, been notified of the issue of the writ by the plaintiff in the action.

AS TO SETTING ASIDE AN INTERLOCUTORY JUDGMENT, see HALSBURY, Hailsham Edn., Vol. 19, pp. 263-266, paras. 562, 563 ; and FOR CASES, see DIGEST, Practice, pp. 391-393, Nos. 948-970.]

Cases referred to :

(1) *Jacques* v. *Harrison* (1883), 12 Q.B.D. 136 ; Digest, Practice, 391, *948* ; 53 L.J.Q.B. 137 ; 50 L.T. 246 ; *subsequent proceedings* (1884), 12 Q.B.D. 165.

(2) *Hood's Trustees* v. *Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793 ; Digest Supp. ; 97 L.J.Ch. 467 ; 139 L.T. 536.

(3) *Re Harrington Motor Co., Ex p. Chaplin*, [1928] Ch. 105 ; Digest Supp. ; 97 L.J.Ch. 55 ; 138 L.T. 185.

(4) *Evans* v. *Bartlam*, [1937] A.C. 473 ; [1937] 2 All E.R. 646 ; Digest Supp. ; 106 L.J.K.B. 568 ; *sub nom. Bartlam* v. *Evans*, 157 L.T. 311.

APPEAL from a decision of DU PARCQ, J., dated Mar. 3, 1938, reversing Master BURNAND, who made an order that a judgment obtained by the plaintiff against the defendant should be set aside. On Oct. 22, 1937, a writ was issued by the plaintiff against the defendant in respect of an accident which occurred on Dec. 15, 1936. Notice that the writ had been issued was given to the present appellants, the defendant's insurers. The writ was served on Nov. 23, 1937, but the defendant did not enter an appearance. No notice was given to the insurers that the writ had been served, nor of any further steps in the action. On Dec. 8, 1937, judgment was obtained against the defendant in default of appearance, and on Dec. 10, 1937, an order was made that the damages should be assessed by a King's Bench master. On Jan. 12, 1938, the damages were assessed at £2,550 16*s*., and on Feb. 1, 1938, application was made under the Road Traffic Act, 1934, s. 10, to the underwriters requesting them to pay the plaintiff this amount. The underwriters thereupon applied to have the judgment set aside.

H. D. Samuels, K.C., and *Stephen Chapman* for the appellants.

D. N. Pritt, K.C., and *A. F. Engelbach* for the respondent.

Samuels, K.C.: I rely on *Jacques* v. *Harrison* (1). The appellants would have had the right to use the defendant's name in this action. If this judgment is not set aside, and the defendant does not pay, the plaintiff can start an action against the present appellants, who would have no possible defence. If the assured has broken a condition of the policy, that is no longer a defence since the passing of the Road Traffic Act, 1934. There is here a substantial defence on the merits of the case, and the court not only is entitled, but also ought, to set aside this judgment.

Pritt, K.C.: All that the insurers have the right to do is to defend an action in the name of the defendant. Where there is a judgment by consent, the insurers must pay. Their remedy is against their insured. They had notice of the writ. If they elected not to protect themselves, they could not then complain. In *Jacques* v. *Harrison* (1), the applicant was asking for rights which he had originally had, but, if these insurers are asking to come into this action in their own name, that is asking for something more, and they must make out their case. The application to the master was made in the defendant's name. The defendant could not have had this judgment set aside. Therefore, the applicants cannot. The appellants have no rights outside the statute to make any application except under the defendant's name and for his benefit. They cannot have any better rights than the defendant has, unless the statute gives such rights, which it does not.

Samuels, K.C., in reply: The appellants are entitled, as a matter of mere justice, to have this judgment set aside. The underwriters here are injuriously affected, as in *Jacques* v. *Harrison* (1). The court will not allow a judgment to pass on which there has been no proper adjudication: *Evans* v. *Bartlam* (4).

GREER, L.J.: In my judgment, the order made by DU PARCQ, J., should be set aside, the appeal should succeed, and the order made by the master should stand.

It is now established by affidavit that all the parties were served before the matter came for decision before the master. There was some doubt at one time as to whether or not the defendant was served, but now that doubt has been cleared up.

The defendant in the action did not appear. He let judgment go by default. Now the insurers say: "If that judgment remains undisturbed by an order of the court, we will be liable to pay to the plaintiff the sum awarded, in the absence of any defence, in favour of the plaintiff against the defendant." If this case were free from authority, I should have some doubt as to whether or not the appeal should succeed, but I think that it is right to say that this case is within the principle laid down by BOWEN, L.J., on behalf of the Court of Appeal, in *Jacques* v. *Harrison* (1). A That was a different case in some respects, but it was like this in one respect. The nominal defendant had no right whatever to have the judgment set aside. He had chosen not to defend the proceeding, judgment had gone by default, and he in his own name had no right to have that judgment set aside. BOWEN, L.J., in giving the judgment B of the court, said, at p. 167 :

> There are, so far as we can see, only two modes open by which a stranger to an action, who is injuriously affected through any judgment suffered by a defendant by default, can set that judgment aside. . . .

Here there is a judgment which does injuriously affect the insurance C company, in that they are made liable by the Act of 1930 and the Act of 1934 to pay the amount of that judgment. They are, therefore, injuriously affected by the judgment suffered by the defendant by default, and a stranger so affected, says BOWEN, L.J., may, in the first place, obtain the defendant's leave to use his name, if the defendant has not D already bound himself to allow such use of his name to be made. Looking at the policy, it seems to me quite clear (and I do not understand that it is denied) that the defendant had already, at the time that the application to set aside the judgment was made, bound himself to allow the insurance company to use his name. Thereupon, the applicant may :

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> in the defendant's name, apply to have the judgment set aside on such terms as the judge may think reasonable or just.

Those last words were intended to protect the nominal defendant, who might come to the court and say to the master or the judge, as the case might be : "This judgment is all right and I do not want it set aside. F If it is set aside, the only result will be that the action will go on, and I may have to pay the costs of that action." He will be entitled to ask the master or the judge to say that the setting aside of judgment shall be only on the terms that he is to be indemnified so far as the costs of the second action are concerned. Then BOWEN, L.J., goes on, at p. 168 :

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> Or he may, if he is not entitled without further proceedings to use the defendant's name, take out a summons in his own name at chambers to be served on both the defendant and plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the judge may consider right, or, at all events, to be at liberty to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24 (5).

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Those words, I think, in the first part of the paragraph and the second part of the paragraph, were used by BOWEN, L.J., on behalf of the court, consisting of BRETT, M.R., and BOWEN, L.J., in order to enable complete justice to be done as between all parties. The defendant in this case did not appear in the action. He chose not to appear on the summons.

He chose not to ask for any terms to be imposed on the setting aside of the judgment, and I think he must stand the consequences of permitting the insurance company to make application to set aside the judgment and to defend the action, after the judgment has been set aside, in the name of the defendant. For these reasons, I think that the master was right and that the judge was wrong, and that the order must therefore A
be set aside.

SLESSER, L.J.: In this case, I think that the judgment of DU PARCQ, J., was a correct one. The position, in my view, depends in part upon B
a consideration of the position at common law and in part upon a consideration of the Road Traffic Act, 1934, s. 10. The position at common law is very clearly stated by TOMLIN, J. (as he then was) in *Hood's Trustees* v. *Southern Union General Insurance Co. of Australasia* (2), at p. 802, a judgment which was expressly approved by this court in that case, following *Re Harrington Motor Co., Ex p. Chaplin* (3), in C
these words, at p. 802:

> The position in law was quite clear, and it was that the appellant [the third party] had no right or claim against the insurance company or against money paid by the insurance company. The assured had a direct right of recourse against the insurance company, but a third party had no such right, because there was no D
> privity between him and the insurance company . . .

That was the position at common law. At common law, therefore, it is quite clear that the plaintiff in this case could not have obtained judgment against the insurance company. In strict law, the insurance company should have paid to the defendant so much money as the E
defendant became liable for to the plaintiff.

The position is altered by the Road Traffic Act, 1934, s. 10, and, in my view, that section, in altering the law, and in imposing an obligation, in certain circumstances, on the insurance company, has provided a code which establishes the whole of the liability of the insurance company F
and the conditions under which that liability arises. Reading so far as is here material, it is provided that:

> (1) If, after a certificate of insurance has been delivered [as there stated, and as was the case here], judgment . . . is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel [which G
> question does not arise here] . . . the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment . . .

Certain conditions are laid down which I read to be for the protection of the insurance company, and the one which is here material is Condition 2 to the following effect: H

> No sum shall be payable by an insurer under the foregoing provisions of this section (*a*) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings . . .

In the present case, those conditions were complied with. Notice dated Oct. 26, 1937, was served upon the insurance company by the solicitor for the plaintiff:

> We are writing to inform you that on the instructions of Mr. Alfred Windsor, the personal representative of the estate of the late Mr. Windsor, we have issued a writ against your insured, Mr. Chalcraft, claiming damages arising out of the negligence of your insured on Dec. 15.

That writ is dated Oct. 22, 1937, and therefore, as I say, it complies with the only condition affecting the insurance company—namely, that notice should be given before or within seven days after the commencement of the proceedings.

In those circumstances, I think that the position is this. It may well be that the insured person may be liable on breach of contract with the insurance company in not allowing them to have that conduct and control of the proceedings which he had undertaken by his insurance policy to give. That liability, of course, would apply equally at common law. Apart from that, it seems to me that, if he suffers judgment, either by default or by electing to suffer judgment by compromise during the proceedings, a judgment has been obtained against him within the meaning of the section, and, provided that due notice is given to the insurance company at the time of the issuing of the writ, in order that they may take over the proceedings from the defendant, or do whatever they think necessary in the protection of their own interests, a complete liability is thereby established, unless the case is one where the insured person himself could, had there been no question of insurance, have set aside the judgment obtained by default. If the insured person could have set aside the judgment so obtained by default, then there would not have been a judgment within the meaning of sect. 10 (1), and, if the insurance company, who were entitled to take proceedings in his name, could have set aside the judgment obtained by default on grounds which would have entitled the insured himself to have done so, equally there would have been no judgment obtained, and sect. 10 (1) would not have justified judgment being obtained against the defendant, and would not have justified the insurance company being liable under the judgment which had been obtained against the defendant.

It is conceded, I think, in this case—but, be it conceded or not, I am clearly of opinion—that there are here no grounds on which either the defendant could have questioned the judgment obtained against him by default, or the insurance company could have questioned it on a ground other than the ground suggested by Mr. Samuels, that they had not themselves been heard. In my view, any contrary opinion would produce an extraordinary result. I have mentioned the case of a judgment agreed by compromise during the trial. If such a case had arisen, if Mr. Chalcraft, during the trial, had suffered judgment by consent, it is obvious, to my mind, that the insurance company could not have availed themselves of this opportunity, of which they are now seeking to avail themselves—of setting aside this judgment by default—

and it would have followed that they necessarily would have had to pay. I cannot think that the situation is any other because the judgment has gone by default.

I have only one further matter to mention, and that is with regard to the reference which has been made in argument to the very important case of *Jacques* v. *Harrison* (1), which, of course, is binding upon us. The A
reason why I do not think that *Jacques* v. *Harrison* (1) avails in the present case is this. As I have indicated, I think that the liability which, for reasons of public policy, is imposed by the statute upon the insurance company is one which is statutorily imposed subject to the specified statutory protection of the obligation to give the insurance company B
notice. If the insurance company fail to avail themselves of that statutory protection, then they cannot say, within the language of BOWEN, L.J., that there is any injustice which they can seek to have corrected by a further hearing. If there be such an injustice, it seems to me to be one which is imposed upon them by the legislature. C

Finally, I would comment on this fact, to which Mr. Pritt drew our attention, that, where the legislature has thought fit, under sect. 10, to make special provisions with regard to notice, it has been at pains so to do. In sect. 10 (3), which does give to the insurance company power to obtain a declaration that a policy has been obtained by non-disclosure D
of material facts, or by misrepresentation of facts which were false in material particulars, to quote the actual words, there is a proviso that the insurance company, who have obtained such a declaration, cannot avail themselves of it unless, before or within seven days after the commencement of that action, they give notice thereof to the person E
who is the plaintiff in the original proceedings, thereby giving that third party an opportunity to come in and say that the policy is valid, because, of course, if the policy is invalidated as between the assured and the insurance company, there is nothing in subsect. (1) on which the plaintiff could rely. Mr. Pritt comments (and I think it is a matter F
of fair comment) that there is no similar provision in subsect. (1). For these reasons, because I think subsect. (1) contains a code which, once complied with, gives the plaintiff the right to be paid the sum obtained on a judgment, whether by default, by compromise or after action fought out, without any discrimination being drawn in the language G
of the section, I think that DU PARCQ, J., was right, and that this appeal should be dismissed.

MACKINNON, L.J.: I think that this appeal should be allowed and that the order of Master BURNAND should be restored. The appli- H
cation arises under R.S.C., Ord. 27, r. 15, which reads:

> Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit. . .

Prima facie, of course, that contemplates an application to set aside a judgment by default by the parties against whom the judgment is given, but it is quite clear that an application to set aside a judgment against the nominal defendant may be made by some other person, not a party to the record, who is interested in the judgment, and who has an interest in getting it set aside. That is exactly the position contemplated and defined by Bowen, L.J., in the crucial passage in *Jacques* v. *Harrison* (1), at p. 167:

> There are, so far as we can see, only two modes open by which a stranger to an action, who is injuriously affected through any judgment suffered by a defendant by default, can set that judgment aside. . . . He may, in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply to have the judgment set aside on such terms as the judge may think reasonable or just.

By Condition No. 2 of the policy, the nominal defendant, Mr. Chalcraft, did bind himself to allow the strangers to this litigation, the underwriters, to use his name. Therefore, those strangers to this litigation may, in that defendant's name, apply to have the judgment set aside. The position might conceivably arise in many other aspects of insurance. The liability of a shipowner for damage done to his ship in a collision is commonly insured as to three-quarters by underwriters and as to a quarter by a protection club. If, in a collision action, a shipowner chose to be so foolish as to admit liability and to submit to a reference to the Admiralty Registry, the underwriters and the protection club, strangers to the litigation, and not nominal parties at all, might very likely—I am not sure that they could—within that rule of Bowen, L.J., apply to have that default judgment set aside, so as to have the action tried on its merits, but the right of the underwriters, the strangers spoken of by Bowen, L.J., in such a case, would arise only by virtue of the contractual relations with the named and nominal defendant.

In this case, by virtue of the provisions of the Road Traffic Act, the underwriters, the strangers to the litigation, have much more than a contractual right with the nominal defendant. They have an actual interest by reason of the liability imposed upon them by statute to make good the amount of the judgment to the plaintiff, and for that reason it seems to me that they, of all people, are the sort of strangers interested in the judgment as being injuriously affected by it, who have a right, within the principle laid down by Bowen, L.J., to intervene, and to ask to have the judgment by default set aside.

I cannot agree with the suggestion that they can have it set aside only if the nominal defendant has a similar right. The truth is that only in very rare cases can the nominal defendant, who has himself consented to judgment, or allowed it to go by default, ask to have it set aside, unless he can make out that it was due to some inadvertence on his part, or that he had no notice of, or that he made a mistake about, the time of the action, or something of that sort. It is by reason of the fact that he has no pecuniary interest in his liability, and that the strangers to the proceedings really have the whole interest, that they have a right to set aside the judgment. The rule would have very little effect given to it in such a case as this if it were to be held that the strangers to the litigation could exercise their right under this rule only in a case where the nominal defendant himself had similar rights.

The only other matter I venture to refer to, by way of criticism of A
what SLESSER, L.J., has said, is to point out that any analogy from the case of a nominal defendant having submitted to a judgment by consent or compromise, in the course of proceedings, seems to me irrelevant and immaterial. We are here concerned with the application of the rule in THE ANNUAL PRACTICE in reference to a judgment by default, B
and are concerned with the application of that rule only. This is a judgment by default, and any analogy from what might happen in the case of a judgment by consent, or by way of a compromise, seems to me immaterial. I think that the appeal ought to be allowed, and that the order of Master BURNAND ought to be restored. C

Appeal allowed with costs in both courts. Leave to appeal granted.

Solicitors: *L. Bingham & Co.* (for the appellants); *Theodore Bell, Cotton & Curtis* (for the respondent).

D

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re A DEBTOR (NO. 18 OF 1937).

[Chancery Division (Farwell and Morton, JJ.), **May 16, 1938.**]

Moneylending—Memorandum of loan—Sufficiency of—Statement of one promissory note for £100—Two notes for £50 each actually given—Moneylenders Act, 1927 (*c.* 21), *s.* 6 (2).

A moneylender had agreed to advance a sum of £100, and a memorandum was drawn stating that the loan was secured by a promissory note for £100 and stating the terms of the note. The moneylender found that he had not a note for £100 available, and therefore took two notes for £50 each :—

Held : as each note could have been indorsed to a third party, who could have sued the borrower, the inaccuracy in the memorandum was not a trivial one, and the memorandum did not comply with the terms of the Moneylenders Act, 1927, s. 6 (2).

[EDITORIAL NOTE. This case again shows the need for meticulous accuracy in the preparation of the memorandum of a loan. It will be appreciated that printed and stamped forms are used for promissory notes, which, of course, must be stamped before execution.

As to Form of Memorandum, see HALSBURY, Hailsham Edn., Vol. 23, pp. 190, 191, para. 280 ; and for Cases, see DIGEST, Supp., Money and Moneylending, Nos. 353a-353x.]

Cases referred tc :

(1) *Gaskell, Ltd.* v. *Askwith* (1929), 45 T.L.R. 566 ; Digest Supp.

(2) *Reading Trust, Ltd.* v. *Spero, Spero* v. *Reading Trust, Ltd.*, [1930] 1 K.B. 492 ; Digest Supp. ; 99 L.J.K.B. 186 ; 142 L.T. 361.

(3) *Long* v. *Millar* (1879), 4 C.P.D. 450 ; 17 Digest 333, *1451* ; 48 L.J.Q.B. 596 ; 41 L.T. 306.

(4) *Sherwood* v. *Deeley* (1931), 47 T.L.R. 419 ; Digest Supp.

(5) *Temperance Loan Fund, Ltd.* v. *Rose*, [1932] 2 K.B. 522 ; Digest Supp. ; 101 L.J.K.B. 609 ; 147 L.T. 330.

(6) *Parkfield Trust, Ltd.* v. *Curtis*, [1934] 1 K.B. 685 ; Digest Supp. ; 103 L.J.K.B. 609 ; 150 L.T. 436.

(7) *Lancashire Loans, Ltd.* v. *Black*, [1934] 1 K.B. 380 ; Digest Supp. ; 103 L.J.K.B. 129 ; 150 L.T. 304.

(8) *Mason & Wood, Ltd.* v. *Greene*, [1936] 2 K.B. 370 ; [1936] 2 All E.R. 509 ; Digest Supp. ; 105 L.J.K.B. 774 ; 155 L.T. 11.

(9) *Simmons* v. *Russell Financiers, Ltd.*, [1934] 2 K.B. 487 ; Digest Supp. ; 103 L.J.K.B. 724 ; 151 L.T. 472.

(10) *Dunn Trust, Ltd.* v. *Feetham*, [1936] 1 K.B. 22 ; Digest Supp. ; 105 L.J.K.B. 52 ; 154 L.T. 53.

(11) *Mitchener* v. *Equitable Investment Co., Ltd.*, [1938] 1 All E.R. 303 ; Digest Supp.

(12) *Re A Debtor* (*No.* 247 *of* 1930), [1930] 2 Ch. 239 ; Digest Supp. ; 99 L.J.Ch. 356 ; 143 L.T. 292.

(13) *Re Debtor, Ex p. Debtor* (*No.* 591 *of* 1934), [1935] Ch. 353 ; Digest Supp. ; 104 L.J.Ch. 228 ; *sub nom. Re Debtor* (*No.* 591 *of* 1934), *Ex p. Debtor* v. *Petitioning Creditors & Official Receiver*, 152 L.T. 368.

(14) *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349 ; 8 Digest 428, *67* ; 90 L.J.Ch. 116 ; 124 L.T. 664.

(15) *Williams* v. *Atlantic Assurance Co., Ltd.*, [1933] 1 K.B. 81 ; Digest Supp. ; 102 L.J.K.B. 241 ; 148 L.T. 313.

(16) *Cullen* v. *Knowles*, [1898] 2 Q.B. 380 ; 12 Digest 37, *150* ; 67 L.J.Q.B. 821.

Appeal from a decision of the registrar of the Guildford County Court. On Apr. 5, 1938, a receiving order was made against the debtor, and on this appeal he asked that that receiving order be reversed and the petition be dismissed, on the grounds that the debt alleged to be due to the petitioning creditor was due to him, if at all, as a moneylender in respect of a loan made by him after the commencement of the Moneylenders Act, 1927, and that there was, on the facts proved or admitted before the registrar, no, or no sufficient, note or memorandum to satisfy sect. 6 of the Act, in that the purported note or memorandum thereof did not contain all or the true terms of the contract in that the loan was secured, not as in the memorandum stated by one promissory note, but by two promissory notes.

J. B. Blagden and *Douglas Potter* for the appellant.

Henry O'Hagan for the respondent.

Blagden : When, in the course of the proceedings, it appeared that the petitioner was a moneylender, it became the duty of the court to look behind the judgment, and it did so, and saw the note of the statutory memorandum. The registrar was wrong in coming to the conclusion that the memorandum was sufficient. There were two promissory notes, and not one, as therein stated. A memorandum cannot be good unless by merely looking at it, and at some document related only to it, the debtor can ascertain all the terms of the bargain. It is not possible to connect the two promissory notes and to regard them as one document. [Counsel referred to *Gaskell, Ltd.* v. *Askwith* (1), *Reading Trust, Ltd.* v. *Spero* (2), *Long* v. *Millar* (3), *Sherwood* v. *Deeley* (4), *Temperance Loan Fund, Ltd.* v. *Rose* (5), *Parkfield Trust, Ltd.* v. *Curtis* (6), *Lancashire Loans, Ltd.* v. *Black* (7), *Mason & Wood, Ltd.* v. *Greene* (8), *Simmons* v. *Russell Financiers, Ltd.* (9), *Dunn Trust, Ltd.* v. *Feetham* (10), *Mitchener* v. *Equitable Investment Co., Ltd.* (11), *Re A Debtor* (*No.* 247 *of* 1930) (12), *Re Debtor, Ex p. Debtor* (*No.* 591 *of* 1934) (13).]

O'Hagan : There has been compliance with the Moneylenders Act, 1927, s. 6. The question is not whether or not there has been a clerical error, but whether or not there has been a trivial error. The fact that two promissory notes have been used instead of one because the lender made use of two notes of £50 each, because he had not one for £100 available at the time, is a matter which is trivial in the extreme. They were given as security for the debt. The only effect of an attempt to assign a part of a debt would be to give the person who takes it an equitable right. There is no prejudice to the debtor in this case, and no real inaccuracy. There was one transaction. As the notes have to be stamped before signature, he had no alternative. [Counsel referred to *Re Steel Wing Co., Ltd.* (14), *Williams* v. *Atlantic Assurance Co., Ltd.* (15), *Cullen* v. *Knowles* (16).]

Blagden, in reply : The debtor could be subject to two different actions, in the circumstances of the present case as shown by the Bills of Exchange Act, 1882, ss. 31, 38 (1), 89.

FARWELL, J.: This is an appeal by a debtor against a receiving order made by the registrar of the Guildford County Court. The petitioning creditor is a registered moneylender, and the debt is a debt incurred as a result of a moneylending transaction between the debtor and the creditor. On Oct. 25, 1936, the creditor lent the debtor £100, and took, as security for that amount, two promissory notes, both dated the same day—Oct. 25, 1936—and both in exactly similar terms. One of them was a promise by the debtor to pay the creditor

> the sum of £50 together with interest thereon at the rate of 48 per cent. per annum, by the following instalments: £5 on Jan. 1, 1937, and £5 on the 1st of each succeeding month such instalments to include both principal and interest. In case of default of any instalment or part thereof the whole remaining balance of the said principal sum of £50 then outstanding, together with due interest at the rate aforesaid to date of default shall immediately become due and payable, and such balance of principal and interest shall carry simple interest from the date of such default until payment at the aforesaid rate of £48 per cent. per annum.

The memorandum, signed at the same time by the debtor, was in this form:

> Memorandum of contract for a proposed advance to be made on Oct. 23, 1936, to [the debtor] by you of the sum of £100 with interest at the rate of 48 per cent. per annum the security of a promissory note payable to [the creditor] by consecutive monthly payments of £10 each commencing on Jan. 1, 1937. In the event of default in payment of any instalment or part thereof, the whole balance of principal then remaining unpaid together with interest at the rate aforesaid to the date of default shall immediately become due and payable and such balance of principal and interest so remaining due as aforesaid shall carry simple interest from the date of such default until payment at the rate of 48 per cent. per annum.

That was signed by the debtor. Then there was added:

> I hereby acknowledge to have received a copy of the above memorandum and confirm that it was signed before the money was advanced or the above-mentioned promissory note was given. I also agree that the above rate of interest is a fair rate for the risk taken and that I am satisfied with the terms of this transaction.

That memorandum was signed in order to fulfil the requirements of the Moneylenders Act, 1927, s. 6 (2). One payment was made in respect of the two promissory notes, and no other payment was made, leaving a sum of over £50 which was due. On Sept. 10, 1937, the moneylender obtained judgment against the debtor for the sum of £87 10*s.* 2*d.* for debt and costs. On Oct. 20, 1937, a bankruptcy notice was served and not complied with, and accordingly, on Nov. 15, 1937, a petition was presented. The petition says that the debtor is justly and truly indebted to the creditor in the sum of £87 10*s.* 2*d.* debt and costs on a judgment obtained against the debtor for money lent and interest thereon. That seems to be in common form. The petition having been presented, the matter came before the registrar on Dec. 9, 1937. On an earlier date than that, the petitioning creditor made an application to the registrar for leave to amend his petition. For some reason which I am not able to understand, leave to amend was refused, and that decision was not appealed against, but the petitioning creditor, in an affidavit which was sworn on Mar. 10, 1938, states that he had had previous transactions with the debtor. In para. 7, he says:

> 7. This advance was made at my farm and when the debtor asked for the

> advance I did not have a £100 available, but having two £50 bills I made use of them. The matter was one transaction, viz., an advance of £100, and the only reason why there were two bills was as above stated. I had no other alternative as bills have to be stamped before they are signed.

The petitioner is in this difficulty. The petitioning creditor is saying that there was one loan, and that it was secured by two promissory notes, for the reason which he states in that affidavit. When the affidavit verifying the amount in the petition was filed, the actual amount which was said to be due was £79 13*s.* 11*d.* The affidavit which was sworn verifying the petition was in these terms :

> That [the debtor] was on and before the filing of the petition and still is justly and truly indebted to me in the sum of £79 13*s.* 11*d.*, being as to £69 19*s.* 4*d.* the balance of £100 principal money advanced, as to 18*s.* 1*d.* interest at 5 per cent. per annum computed on the said sum of £69 19*s.* 4*d.* from June 7 to Dec. 10, 1937, due on two promissory notes in my favour and as to £8 16*s.* 6*d.* the scale costs of a judgment obtained by me against the debtor in the Kingston-upon-Hull District Registry of the King's Bench Division of the High Court of Justice in respect of the principal money and interest due on the said promissory notes with accrued interest making the sum of £79 13*s.* 11*d.* due under this judgment, and I have also a claim for interest on the said promissory notes which is postponed interest under the Moneylenders Act, 1927, s. 9 (1), for the sum of £7 16*s.* 3*d.*, being the balance of the interest due and included in the judgment after deducting the interest claimed at 5 per cent. per annum for which sums or any part thereof I say that I have not nor hath any person by my order or to my knowledge or belief for my use had or received any manner of satisfaction or security whatsoever. The particulars required pursuant to the Moneylenders Act, 1927, s. 9 (2), are indorsed hereon.

On that coming before the registrar, he made a receiving order, and this appeal is from that order. There is really, in my judgment, only one question of substance in this matter, and that arises in this way. In order to comply with the Moneylenders Act and with the Bankruptcy Rules, there must be produced to the court a memorandum which is in accordance with the Moneylenders Act, 1927, s. 6 (2), which says :

> The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the first schedule to this Act.

It is said that the memorandum in this case does not comply with that subsection, because the memorandum states that the security for the loan is a promissory note, and in truth and in fact there were two promissory notes. Instead of there being a promissory note for £100, there were in fact two promissory notes for £50 each. It is said, therefore, that that is not a compliance with the Act, because the memorandum does not contain all the terms of the contract, one of the terms being that there were two notes instead of one. The reply is that it was an error in the form of the memorandum, but not a matter which should affect the transaction at all. A large number of authorities has been referred to, but in substance it comes to this : that an error, whether clerical or not, does not necessarily invalidate the memorandum if it is of such a nature that it does not affect the true obligation or position of the borrower. The provision in the Act as to the memorandum was intended for the protection of the debtor. The debtor was to know what the terms of the loan were, and was to have a memorandum showing what the terms were. If the memorandum does not disclose the true terms, so that the debtor is prejudiced, or so that his position is not so good as it appears to be, then the memorandum may not comply with the section. On the other hand, if the error is one which can be easily seen to be an obvious error, and which can be easily understood to be an error, so that the debtor will appreciate what the true position is, or that it is so trivial that it does not affect the position at all, the error will not be sufficient to affect the memorandum. In my judgment, the whole question here is the failure to state the true effect, one which is sufficient to prevent the memorandum from being a compliance with the statute. There is no doubt that the person who signed the memorandum was perfectly well aware that there were two promissory notes. It has not been suggested that he was not. None the less, the memorandum does not state the whole effect of the contract, because it states that the loan is secured by a promissory note, and there are in fact two promissory notes. It is said that the position of the debtor is none the worse whether there be two notes or one. I think that this case is one in which the difference might affect the position of the debtor, and might possibly make him liable to two claims by two different people, and to two actions, with the possible result that there would be two sets of costs to be paid. I think that it is plain that one promissory note or both could be indorsed and handed over to another person or persons for value, and either of them could sue for the debt. Although the risk of that may not be in truth a very serious one, the fact remains that the position of the debtor is less favourable to him than it would have been if the transaction had been as stated in the memorandum. For these reasons, I have come to the conclusion that the registrar ought not, in the circumstances, to have made a receiving order, but should have dismissed the petition. In my judgment, this appeal should be allowed, and the petition be dismissed.

Morton, J.: I agree.

Appeal allowed and petition dismissed.

Solicitors: *Isadore Goldman & Son* (for the appellant); *Barnes & Butler*, agents for *John Lewenstein*, Hull (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL v. DAVIS.

[King's Bench Division (Branson, Humphreys and du Parcq, JJ.), **May 17, 1938.**]

Factories and Shops—Hours of closing—Sale of newly baked bread after permitted hours—Whether newly baked bread within the exemption of " newly cooked provisions "—Shops (Hours of Closing) Act, 1928 (*c.* 33), *ss.* 1, 8, *Sched.* I (1) (*b*). A

On Nov. 3, 1937, after 8 p.m., a customer was served in the respondent's shop with newly baked bread rolls, to be consumed off the premises, and another customer was served with half a loaf of newly baked bread, also to be consumed off the premises. The respondent was charged with having kept the shop open for the serving of customers after B the hour of 8 p.m., in contravention of the Shops (Hours of Closing) Act, 1928, s. 1. By Sched I (1) (*b*) to the said Act, it is provided that customers may be served after the said hour of 8 p.m. with, *inter alia,* " newly cooked provisions . . . to be consumed off the premises." The magistrate dismissed the charge, holding that newly baked rolls or newly baked bread could be properly described as " newly cooked provisions." C Thereupon this appeal was brought :—

Held : as it was impossible to exclude newly baked rolls or newly baked bread from the scope of the expression " newly cooked provisions," within the meaning of the exemption clause in the Act of 1928, no offence had been committed.

[EDITORIAL NOTE. The only question in this case is whether newly baked D bread comes within the term " newly cooked provisions " as used in the Shops (Hours of Closing) Act, 1928. The judgments are very helpful, as they deal with the principles of interpretation to be applied to modern statutes dealing with a multiplicity of matters.

As to Shop Regulation Acts, see HALSBURY, Hailsham Edn., Vol. 14, pp. 685-693, paras. 1297-1314 : and for Cases, see DIGEST, Vol. 24, pp. 928-934, E Nos. 192-227.]

Appeal by way of case stated from a decision of one of the magistrates of the police courts of the metropolis sitting at the Greenwich Police Court. The facts and the arguments are referred to in the judgments.

Geoffrey Hutchinson for the appellants. F

E. T. Rhymer for the respondent.

Branson, J. : This is an appeal by way of case stated from the magistrate sitting at the Greenwich Police Court. An information was preferred before him on behalf of the London County Council, charging G the respondent with having kept a shop open for the serving of customers after the hour of 8 p.m. in contravention of the Shops (Hours of Closing) Act, 1928, s. 1, whereby she became liable to the fine provided by sect. 8 of that Act. The magistrate dismissed the information, and the appellants have appealed to this court. H

The facts of the case are found by the magistrate as follow : that the place was a shop, that the respondent was the occupier of the shop and sold general provisions therefrom, and that at 9.55 p.m. on Nov. 3, 1937, a customer was served in the said shop with newly baked bread rolls, to be consumed off the premises, and another customer was served with half a loaf of newly baked bread, also to be consumed off the premises. The whole point which was raised before the magistrate, and which arises again in this court, is whether or not those newly baked bread rolls and that half loaf of newly baked bread come within the words " newly cooked provisions " in the Shops (Hours of Closing) Act, 1928, Sched. I.

Mr. Hutchinson has said all that can be said, as it seems to me, to try to persuade the court that newly baked bread rolls and newly baked bread do not come within the words " newly cooked provisions." It is not a matter on which there can be much argument, but it appears to me that, the word used by the statute in the clause in question being the widest word that one can readily think of to cover every kind of eatable, there seems to be no reason for this court to restrict the meaning which is to be put upon the language used by the Act.

In my view, the magistrate was right in coming to the conclusion that a newly baked roll or half a loaf of newly baked bread was properly described as newly cooked provisions. If reference is to be made to the supposed intention of the legislature, it seems to me that the exceptions in the schedule under (*a*) and (*b*) point very distinctly to the desire of the legislature to allow people who want to buy a hot meal for supper and take it home and consume it in their own houses to do so. The legislature was not interested in the kind of food which the purchaser wanted to buy. So long as it was newly cooked, and so long as it was food for him to eat, he was to be allowed to get it, and the shop was to be allowed to sell it, without committing an offence.

The magistrate has found that these rolls and this bread were newly baked. That, of course, is a question of fact which the magistrate would have to decide, and by which this court is bound.

It is suggested by Mr. Hutchinson that a different meaning can be found for the expression " newly cooked provisions " if one looks at the schedules to the Shops (Sunday Trading Restriction) Act, 1936. As to that, I should like to say that, in the first place, I think that it is rather difficult to draw, from the language of an Act passed in 1936, without any special reference to the earlier Act, inferences as to the meaning of the legislature when it used certain language in 1928. It cannot be said that the language used was in any sense a term of art. In my view, no help can be got from a consideration of the Act of 1936, and therefore I do not refer to it any further. I think that this appeal should be dismissed.

HUMPHREYS, J.: I have arrived at the same conclusion. For my own part, I find it impossible to decide this question on the basis of arriving at any conclusion as to what the legislature intended by the terms of Sched. I. There are Acts of Parliament in regard to which it is possible to say that there is a clear scheme to be found running through the Act, and that any particular provision must be construed in relation to that scheme of the legislation. This is one of the Acts of Parliament in which one finds that the opening words indicate a perfectly plain, direct statement as to what is to be done, and the rest of the Act is taken up with exceptions to that general statement of the law. The result is that, while in sect. 1 it is provided that every shop is to be closed for the serving of customers on certain days and at certain hours, one finds that almost every trade which one can think of is to some extent exempted from these provisions. It is not difficult to understand what has happened. Parliament, as I suppose even judges may be allowed to know, consists of a number of persons elected from different parts of the Kingdom, with special interests in their own particular constituencies. Representations have been made, and as a result the general provision is cut down in all sorts of directions. In sect. 6 of the Act it is found necessary to provide that shops in places where sea fishing is principally carried on during certain seasons of the year shall be exempt from the necessity of closing at particular hours, and the local authority are left to do the best they can in the matter by making any regulations they think fit. In regard to exhibitions, the same thing applies, and, when one comes to the schedule and finds such things as a proviso that, for the purpose of that schedule, tobacco is to be deemed to form part of a meal if it is supplied with the meal, it may be argued that that refers to tobacco sold for the purpose of chewing only, but it is doubtful whether that is the real intention.

There is almost no nonsensical proposition which might not be seriously put forward as the result of looking at these innumerable exceptions. When one comes to the one which is the subject of this case, one finds that Parliament has enacted that one of the transactions which is not prevented by this Act, and which is not to be prevented by any closing order under the Act, is the sale of newly cooked provisions and cooked or partly cooked tripe, to be consumed off the premises. I assume that there is some particular reason for dealing with tripe, with which I am not familiar, but in regard to "newly cooked provisions" I can only say that I am very glad that it did not fall to my lot to have to decide in the first instance whether the words "newly cooked provisions" include or do not include newly made bread. I use the word "made" intentionally, because, for my own part, I have never, until to-day, heard the expression "newly cooked" applied to bread, and I think that the most attractive part of Mr. Hutchinson's argument was that in which he pointed out to the court that the expression that is to be found in numerous Acts of Parliament which relate to bread is never "newly cooked bread," but "newly baked bread or rolls." That might be an indication that, if Parliament is to be credited with any intention in the matter, it probably did not intend to include bread among the various articles included in the expression "newly cooked provisions." However, this is a matter which falls to be decided by a magistrate in the first instance. The magistrate knows the practice of people who live in

Greenwich, where he was sitting, a great deal better than I can pretend to know it, and he has come to the conclusion that there is no ground for saying that the expression "newly cooked provisions" should be so cut down as not to include that which everybody knows is an ordinary concomitant of a meal which consists of provisions—namely, bread. If it is newly cooked, it comes within the terms of this exception, as the magistrate says. I am not prepared to say that he has gone wrong on any principle of law or on any matter on which I am competent to set him right. For that reason, I agree that the appeal should be dismissed.

DU PARCQ, J.: I also agree, and I feel that, although this may not be a matter of great constitutional importance, as we are told by Mr. Hutchinson that it is of great administrative importance, I ought to add a few words.

It seems to me that, the more one considers this question, the more one sees that it is impossible to exclude bread or rolls, freshly made, from the scope of the expression "newly cooked provisions." I agree that at first sight it is an attractive argument that, as one does not normally speak of cooking dough, or even of cooking bread, therefore Parliament ought not to be assumed to have meant to include bread in the expression "newly cooked provisions." It seems to me, however, that reflection shows the answer to that argument to be one which is really convincing. Parliament has used the widest term possible—"provisions." I cannot think of any wider term to include edibles of almost every kind. "Cooked," again, is a very wide term. One may cook by baking, boiling, roasting and by many other ways. It is conceded, I think, that a suet pudding, for instance, which has just come from the saucepan—if that is the receptacle in which it is cooked—would come within the term "newly cooked provisions." Yet nobody says "I am going to cook suet, flour and eggs," and whatever the other ingredients may be. What they say is: "I am going to make a pudding." So with a pie. The phrase is: "I propose to make a pie." What is done is to cook the various ingredients which go to the making of the pastry, which is outside, and whatever may be enclosed within it. Again, it is conceded that hot toast would come within this expression. Yet nobody says: "I am going to roast a piece of stale bread in front of the fire." What they say is, "I am going to make toast," just as the baker says: "I am going to bake bread." I do not think that any guidance is really to be obtained by considering the expression in order to indicate a particular kind of cooking. It would have been impossible for Parliament, or at any rate very difficult for Parliament, to enumerate, in colloquial language, every kind of cooking. What they have done actually is to use a wide term, I think because they intended to throw the net very wide and to include every sort of article which is intended for the food of man and which has been newly cooked.

I agree with BRANSON, J., that we really cannot have regard to what the consequences may be, and that we can decide what the intention of Parliament is only by looking to see what Parliament has said.

I would only like to add, with regard to the Act of 1936, that, while I agree with Branson, J., that really it is not useful to look at a later Act, yet, even if one does look at it, there is no contradiction between the terms of the later Act and the terms of the Act which we are construing. If one compares Sched. I and Sched. II of the Shops (Sunday Trading Restriction) Act, 1936, all that the comparison shows is that a distinction is drawn between " bread and flour confectionery, including rolls and fancy bread," and bread which comes within the term " newly cooked provisions." At any rate, to hold that that is what the Act means is quite a possible and reasonable view to take of the Act, just as it is clear that, when, in Sched. II, the sale of fish is included in transactions in respect of which a partial exemption order may be made, Parliament did not intend necessarily to exclude fish from Sched. I. Indeed, that is made abundantly clear, as was pointed out during the argument, by the use of the words " in so far as such sales are not included amongst the transactions mentioned in Sched. I of this Act." In other words, the sale of bread may be included in Sched. I. Thus really, if we accede to Mr. Hutchinson's argument so far as to look carefully at the Act of 1936, in my view it does not assist us. For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *J. R. Howard Roberts* (for the appellants); *G. Hemming*, Catford (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

CANT *v.* ALEXANDER HARLEY & SONS, LIMITED.

[King's Bench Division (Branson, Humphreys and du Parcq, JJ.), **May 13, 1938.**]

Food—Meat in possession of respondents—Whether on premises for purpose of sale and intended for food of man—Statutory onus of proof on respondents —Whether onus discharged—Public Health Act, 1875 (c. 55), *ss.* 116, 117—*Public Health Acts Amendment Act,* 1890 (c. 59), *s.* 28.

The respondents were charged with being in possession of certain tuberculous meat contrary to the Public Health Act, 1875, s. 117, as extended by the Public Health Acts Amendment Act, 1890, s. 28. By sect. 116 of the Act of 1875 the onus of proof that the said meat was not exposed or deposited for sale, or was not intended for the food of man, is placed upon the party charged. The respondents led evidence in order to discharge the onus on them under sect. 116, and the magistrates found that that evidence " was very probably true," and that, as they were not satisfied beyond reasonable doubt that the meat was on the premises for the purpose alleged, the respondents were entitled to the benefit of the doubt. They accordingly dismissed the charge:—

Held: the onus of proof imposed by sect. 116 of the Act of 1875 had not been discharged by the respondents, and the offence with which they were charged was therefore proved.

[**EDITORIAL NOTE.** This is a case that will be of great help to officers of courts of summary jurisdiction in dealing with offences under the statutes and regulations designed to protect the public from impure food. It deals not only with the construction of such enactments, but also with the onus of proof and the amount of proof required to support a conviction for an offence under them.

As to Sale of Meat, see HALSBURY, Hailsham Edn., Vol. 15, pp. 181-183, A paras. 305-309; and for Cases, see DIGEST, Vol. 25, pp. 108-115, Nos. 322-384.]

Appeal by way of case stated from a decision of magistrates sitting in the county borough of Dudley. The facts and the arguments are set out in the judgments.

B *H. A. Tucker* for the appellant.

E. G. H. Beresford for the respondents.

Branson, J.: This is an appeal by way of case stated from a court C of summary jurisdiction sitting in the county borough of Dudley. The court dismissed an information preferred by the appellant Cant on behalf of the mayor, aldermen and burgesses of the borough against Alexander Harley & Sons, Ltd., who are butchers. The charge was that a certain pig's spleen was in the possession of the respondents contrary to the D provisions of the Public Health Act, 1875, s. 117, as extended by the Public Health Acts Amendment Act, 1890, s. 28. I do not think that it is necessary for me to re-state in detail the facts found by the magistrates in the case stated. Those facts may be stated, sufficiently for the point to be decided, in a much shorter form. At 10.25 a.m. on Saturday, E Nov. 27, a sanitary inspector called at the shop and examined the meat, and he found upon a tray at the back of the left-hand counter, amongst other things, the spleens of two pigs. These spleens he examined, and found that one of them was tuberculous, and he proceeded to seize the tuberculous spleen. He was informed by Mr. Alexander Harley, a director F of the company and the manager of the shop, that the meat had been delivered with other goods by a firm of wholesale butchers that morning about half-an-hour before, that nobody had had time to look at it, and that it would have been looked at before being sold. All the necessary preliminaries for bringing the information for penalties were duly com-G plied with, and the case came before the magistrates for determination. There evidence was given by Mr. Harley, junior, that all the meat delivered at the shop from outside sources was examined by him, that if anyone had come in to buy the meat in question it would not have been sold until he had seen it, that he would definitely have examined the meat H before it was sold, and that, on looking at the unsound spleen, the diseased state must have been apparent to him, and that he would then have put it on one side and rejected that meat. It was admitted by Mr. Harley, senior, that the spleen in question was found by the inspector behind the counter, and that that was the place where this kind of meat was put when it was ready for sale, that the meat was in condition to be handed to a customer, and that nothing had to be done with it. Upon that evidence, the magistrates state, in para. 7 of the case :

> We were much impressed by the witnesses for the defence, and felt that the evidence of Mr. Harley, junior, that he had not had an opportunity to examine the meat, that if anyone had come to buy the meat it would not have been sold until he had seen it, that he would definitely have examined the meat before it was sold, and that he must then have seen its diseased state and would have rejected it, was very probably true.

They then state the contention of the appellant, that the onus of proving that the meat was not deposited upon the premises for the purposes of sale, or not intended for the food of man, was cast upon the respondents by sect. 116 of the Public Health Act, and that the respondents had not discharged the onus put upon them by that Act, and that they ought therefore to have been convicted. The magistrates said that, in their opinion, before they could convict, it was necessary that they should be satisfied beyond reasonable doubt of the truth of the allegation by the prosecution that the meat was, at the time it was seized by the inspector, deposited upon the premises for the purpose of sale, and intended for the food of man. They say that they were not so satisfied. They proceed as follows :

> In our opinion, it was not necessary, in order to discharge the onus of proof referred to in para. 8 [the onus of proof cast upon the respondents by the Public Health Act, 1875, s. 116] that the respondents should satisfy us beyond any doubt whatever that the meat was not deposited on the premises for the purpose of sale and intended for the food of man. It was sufficient if, after hearing the evidence for the defence, we were not satisfied beyond reasonable doubt that the meat was deposited on the premises for the purpose of sale and intended for the food of man, as alleged by the prosecution. The evidence for the defence did produce such doubt in our minds, and, in our opinion, the respondents were entitled to the benefit of that doubt.

In that opinion, and dealing with the material part, beginning with the words " it was sufficient," the magistrates are stating, as it seems to me, quite correctly what would be the onus of proof in a prosecution in which the statute left the onus in the ordinary way upon the prosecution. They are applying that statement to a completely different set of facts, where the statute puts the onus of proof upon the defence. The material words of sect. 116 of the Public Health Act are :

> Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged.

That is an unusual and a strong provision to be found in a statute which is creating an offence. One can quite well see the reason which moved the legislature in the insertion of such a provision. The magistrates, as it seems to me, have really given no effect to that provision of the statute, and, on the contrary, have approached this case as though the onus were in the ordinary way upon the prosecution to prove every element which was necessary to constitute the offence for which the respondents were being summoned. They dismissed the information, they say, because they were not satisfied beyond doubt that the meat was deposited for the purpose of sale, and intended for the food of man. They say that the evidence of the defence produced a doubt in their minds as to whether or not it was so exposed or so intended, and the respondents are entitled to the benefit of the doubt. It seems to me that that is ignoring this provision in sect. 116, that the proof that the same was not exposed or deposited for sale or any such purpose, or was not intended for the food of man, rested upon the party charged. Mr. Beresford has suggested that we ought, in view of the expressions used in para. 7 of the case, to conclude that the magistrates really accepted the defence, but thought, by reason of some contention on the part of the appellant as understood by them, that, in order to find a defence to this information, they had to find, that beyond any doubt whatever the meat was not deposited upon the premises for the purpose of sale, or intended for the food of man. Nobody in fact made any such contention, so far as appears from the case, nor does it seem to me that such a contention would have produced the reaction contended for by Mr. Beresford. I cannot read para. 7, "We were much impressed by the witnesses for the defence, and felt that the evidence of Mr. Harley, junior, was very probably true," as being, "We believed the words of the witnesses for the defence, but we were of opinion that that did not constitute a defence in law," because the very contrary appears from their opinion. They say that, in their view, it is sufficient as a matter of law that the evidence for the defence should raise a doubt in their minds. So far from saying that they believed the evidence for the defence, all they say in the last sentence of the second paragraph of their opinion is :

> The evidence for the defence did produce such doubt in our minds, and, in our opinion the respondents were entitled to the benefit of that doubt.

The result is, in my opinion, that the magistrates have misdirected themselves on the question of law, and that, upon the findings of fact as set out in the case, including the finding as to their own opinion in para. 9, they should have found that the offence was proved, and have dealt with the case in their discretion accordingly.

Humphreys, J. : I am of the same opinion, and I only desire to add a few words of my own because I am of opinion that the group of sections in the Public Health Act, 1875, beginning with sect. 116 and ending with sect. 119, is of the greatest possible importance in the preservation of public health. It is to be observed that these sections are to be found in an Act which deals exclusively with the public health. It is a group of sections headed "Unsound Meat, etc.," and, as Branson, J., has observed, the provisions are stringent provisions, and, departing from the ordinary criminal law of this country in certain important particulars, cast the onus of proof upon the defendant in a criminal prosecution. Sect. 116 provides that certain things may be done by a medical officer of health or inspector of nuisances, and, if certain results obtain, then by sect. 117 the person who was in possession of the article—it may be meat or other articles of food—if that article is unfit, and has been found to be unfit, for the food of man, without any question of his knowledge at all, is responsible in law for having had that article upon his premises. What is to be proved is that the article of food must be, of course, upon the premises of the defendant—it must be proved that the premises are the premises of the defendant—and the article of food must be proved to be diseased, or unsound, or unwholesome, or unfit for the food of man. The section further contains the words that it must be a fact, and it must be alleged to be a fact in the proceedings, that such article of food was either exposed for sale or deposited in any place for the purpose of sale or for the preparation for sale, and intended for the food of man, the latter words, I think, really dealing with the case—a perfectly common case—in which articles have been set aside by a butcher who knows they are unfit for the food of man, and have been set aside for sale, but not for the sale for the food of man at all, but for other purposes. Those matters to which I have just referred are, by the perfectly plain language of the section, declared to be matters in regard to which, if he is to escape the penalty provided for persons upon whose premises is found food unfit for the food of man, he must show—I am paraphrasing rather than reading the section—that the food was not exposed for sale, or was not deposited in any place for the purpose of sale, or the preparation for sale, or intended for the food of man. It is those words which, according to the language of the section, must be proved by the party charged. In this case, can it be said that any of those matters were proved by the party charged ? I find—and Branson, J., has already referred to the language of the opinion of the justices—that they commence their opinion by a statement which, to my mind, is perfectly irrelevant. They say that, in their opinion, they had to be satisfied beyond reasonable doubt of the truth of the allegation by the prosecution that the meat was deposited, and so on, for the purpose of sale, and that they were not so satisfied. In my judgment, the plain words of the section show that that was a mis-statement of the law. They had not to be satisfied that the prosecution had done anything of the sort. They had to be satisfied by the defendants, on the facts of the case, that those were not the facts. Then I agree—and I do not wish to repeat what Branson, J., has said—that the further finding which is to be found in the second part of para. 9 shows that the effect of all the evidence upon the minds of the justices was to produce a doubt, and, therefore, disregarding the language of the section, they came to the conclusion that the defendants were entitled to the benefit of that doubt. In my opinion, this is a case in which it is made quite clear by the statement of the case by the justices themselves that they disregarded the language of the section, and therefore I think that they were wrong in the conclusions at which they arrived.

du Parcq, J.: I agree. However difficult it may be to draw a distinction, I think that there is no doubt that a distinction must be drawn between, on the one hand, "proof beyond all reasonable doubt," and, on the other hand, "proof." If anyone wants to pursue an investigation of the authorities on the subject, he may begin with the passage which has been referred to in PHIPSON ON EVIDENCE, 11th Edn., p. 11. The burden of proof on the prosecution in a criminal case is to prove A beyond reasonable doubt. The burden of proof in a civil action is to prove. I think that there is no authority for saying that, in so far as the burden of proof beyond reasonable doubt is heavier than the burden of proof without those qualifying words, the heavier burden rests upon a defendant in a case such as this. It is, however, in my view, important B that it should be understood that it is quite unnecessary for justices, in dealing with a case like this, to trouble themselves with any subtleties of language, and, if I may say so, I think that the justices have erred here because they have not confined themselves to the plain language of the Act itself. The Act speaks of the proof that the same was not exposed C or deposited for any such purpose, or was not intended for the food of man, and, when the Act says "proof," it means "proof," no more and no less. The only question before the justices was whether the defendant had proved what it was incumbent on him to prove. When one looks at the way in which the justices have stated their opinion, if one asks D first whether they are right in saying it was not necessary that the respondents should satisfy them beyond any doubt whatever that the meat was not deposited upon the premises for the purpose of sale and intended for the food of man, the comment to be made upon that is that it was necessary that the respondents should prove those facts. It only E confuses the matter to introduce the words "satisfy us beyond any doubt whatever." Clearly, the magistrates are wrong in saying it is sufficient if they were not satisfied beyond reasonable doubt that the meat was deposited upon the premises for the purpose of sale. That contradicts the words of the statute. Then we come to their conclusion, and their F conclusion, as I understand it, is that they were left in real doubt, and that, impressed though they may have been by the evidence of the defence, they were left in doubt. If they were left in doubt, one is forced to the conclusion that the defendant had failed to prove what the Act says that he must prove, in circumstances such as these, if he is to be G acquitted. I agree with the other members of the court in saying that in all these cases the magistrates ought to ask themselves the simple question: Is it proved or not? If they believed the evidence of the defendants as reasonable men, then they would be right in saying that the defence was proved. If they are not prepared to accept it, in the sense that, having H heard it, they remained in a real state of doubt or uncertainty upon the subject, the defence is not proved. I agree in the result proposed.

Appeal allowed with costs.

Solicitors: *G. C. V. Cant*, Town Clerk, Dudley (for the appellant); *Gibson & Weldon* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re LOWE'S ESTATE, SWANN *v.* ROCKLEY.

[Chancery Division (Bennett, J.), **May 5, 1938.**]

Wills—Construction—Money in the bank—Money deposited in her own bank by wife—Husband absolutely entitled to interest thereon after wife's death—Necessity for money to be in testator's bank.

A testator, who died on Mar. 19, 1925, gave "all money in the bank, War stock, club money along with any money in hand" equally between the plaintiff, who was his executor, and the first defendant. At the date of his death, the only estate known to the executor was valued at £46 9*s.* Some years later the plaintiff was informed by the solicitor acting for the trustees of the testator's wife, who died on June 6, 1918, and in whose residuary estate the testator had a life interest, that they had been advised that in 1917 she had deposited in the Westminster Bank the sum of £4,495 2*s.* 2*d.* The interest on this sum from June 6, 1918, to Mar. 19, 1925, amounted to £791 18*s.* 3*d.*, which represented the income accrued due during the life of the testator, and was part of his estate. The trustees were prepared to pay this sum to the plaintiff as executor of the testator, and the question arose as to whether this sum should be divided between the plaintiff and the first defendant under the terms of the testator's will:—

Held: this sum, as it was not covered by any descriptive words in the testator's will, and as it was agreed that there was no residuary gift, was undisposed of by his will, and passed as on his intestacy.

[EDITORIAL NOTE. It appears from this decision that the phrase "money in the bank," so commonly used in wills, must refer to a banking account over which the testator has control. In the present case it is clear the money was in *a* bank, and in circumstances in which the testator had a right to call for such part as represented interest to be handed over to him, but this is not sufficient to bring it within the clause.

As to Money at Bank, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 705-708, para. 1327; and for Cases, see DIGEST, Vol. 44, pp. 722, 723, Nos. 5725-5734.]

Case referred to:

(1) *Ogle* v. *Knipe* (1869), L.R. 8 Eq. 434; 44 Digest 707; *5506*; 38 L.J.Ch. 692; 20 L.T. 867.

(2) *Byrom* v. *Brandreth* (1873), L.R. 16 Eq. 475; 44 Digest 725, *5767*; 42 L.J.Ch. 824.

Adjourned Summons by which the plaintiff, the sole executor of the will of James Lowe, and also a beneficiary thereunder, asked that the court should determine whether, upon the true construction of the will, and in the events which have happened, the bequest in the will of "all money in the bank, War stock, club money along with any money in hand" unto and equally between the plaintiff and the first defendant included the sum which should be ascertained to be the apportioned part in respect of the period from the date of the death of the testator's wife to the date of the death of the testator of the interest on a sum of £4,495 2*s.* 2*d.* deposited in a bank by the testator's wife on June 7, 1917, due to the estate of the testator, or whether the said sum was undisposed of by the testator's will and passed as on his intestacy.

C. F. C. Luxmoore for the plaintiff.

Michael Albery for the first defendant, a beneficiary under the will.

J. V. Nesbitt for the second defendant, one of the next of kin of the testator.

Albery : The interest accrued due to the estate of the testator is money in the bank, and would pass under the gift of money at the bank. The money belonged to the tenant for life in equity. [Counsel referred to *Ogle* v. *Knipe* (1) and *Byrom* v. *Brandreth* (2).]

Nesbitt : It is necessary to consider what the money was at the date of the will and also at the date of the testator's death. At the date of the death of the testator's wife, the money was standing to her credit, and it never was the money of the testator. By his will, the testator intended to dispose of his estate, as he knew it. He did not make a residuary gift.

BENNETT, J. : The testator, James Lowe, made his will on Sept. 17, 1924. He died on Mar. 19, 1925. He appointed Herbert Harry Swann to be his executor, and directed that all his debts and funeral expenses should be paid as soon as conveniently afterwards. He then goes on :

> I give and bequeath . . . unto the said Herbert Harry Swann my watch and chain, stock in the shop and fixtures, all money in the bank, War stock, club money along with any money in hand to be equally divided between the said Herbert Harry Swann and Harriett Ann Rockley of Dickenson Street, Nottingham.

The only estate of the testator known to his executor when the testator died was valued at the sum of £46 9*s*. There was £5 5*s*. cash in the house, £15 1*s*. in the Nottingham Savings Bank, household goods valued at £5, stock in trade of a small business of a tobacconist which the testator carried on, valued at £5, an apportioned part of the income up to the date of the testator's death as tenant for life under the will of his late wife is shown as £6 8*s*., and club money in the Provident Sick Friendly Society amounting to £9 15*s*. Recently the plaintiff executor was informed by the solicitor who was acting for the trustees of the testator's wife, who died on June 6, 1918, and under whose will the testator had a life interest in her residuary estate, that they had received a call from the manager of one of the local branches of the Westminster Bank, who disclosed the fact that, on June 9, 1917, the testator's wife deposited in that bank in her own name the sum of £4,495 2*s*. 2*d*., and that, with the interest accrued due since that date, the amount standing to the credit of the account was £6,410 10*s*. 11*d*. The interest allowed on the fund from June 6, 1918, to Mar. 19, 1925, the date of the testator's death, amounted to £791 18*s*. 3*d*., which at that time represented income accrued due during the life of the testator, and was part of his estate, and the trustees are prepared to pay that sum to the plaintiff as the executor of the testator. The question is whether that sum ought to be divided between the plaintiff and Mrs. Rockley under the terms of the testator's will. In order that it may so pass, it must fall within the description of " all my money in the bank." That is the only property described in the will under which it could possibly pass. It is conceded that the gift to the executor and Mrs. Rockley is not a residuary gift. In my judgment, it cannot be said that the claim which the testator had against the executors of his late wife's will to part of the sum standing to the credit of his late wife in some branch of the Westminster Bank was the testator's money in the bank. It is plain, I think, that by those words he was intending to dispose of money in a bank, over which money he had control. He had no control over the sum standing to the credit of the account in his wife's name. For the reason that it is A not covered by the descriptive words which the testator has used, I regard it as undisposed of by his will. There remains only the question of costs, and they will come out of the estate.

Solicitors: *Peacock & Goddard*, agents for *Herbert Hind, Belt & Ratcliffe*, Nottingham (for the plaintiff); *Lee, Ockerby & Co.*, agents for B *J. & A. Bright*, Nottingham (for the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

BOWEN *v.* NORMAN. C

[King's Bench Division (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 18, 1938.]**

Bastardy—Presumption of legitimacy—Born in lawful wedlock—Maintenance order with no provision for non-cohabitation—Necessity for evidence of non-access. D

On Oct. 17, 1935, a married woman obtained a maintenance order against her husband, but the order did not include the provision that the wife should no longer be bound to cohabit with her husband. The wife gave birth to a child on June 20, 1937, and alleged that the appellant was the father of the child. It was contended by the appellant that independent evidence of non-access by the husband was a condition E precedent to the respondent proceeding with her case:—

Held: the mere order for maintenance was not on the same footing as was a decree or deed of separation which is shown to have been acted on by the parties, and evidence of non-access by the husband was essential.

[EDITORIAL NOTE. During wedlock there is a presumption of access by the F husband. This presumption is rebutted by an order providing that the parties are not to cohabit, or by a separation deed which has been acted on. In the present case the order was one for maintenance only, and did not provide for non-cohabitation. In this case, therefore, there was a presumption of access which must be rebutted by evidence.

As to the Rule in *Russell* v. *Russell*, see HALSBURY, Hailsham Edn., Vol. 2, G pp. 562, 563, para. 772; and for Cases, see DIGEST, Vol. 3, pp. 364-368, Nos. 54-97.]

Cases referred to:

(1) *Stafford* v. *Kidd*, [1936] 3 All E.R. 1023; Digest Supp.
(2) *Rimmer* v. *Rimmer* (1930), 144 L.T. 96; Digest Supp.
(3) *Russell* v. *Russell*, [1924] A.C. 687; Digest Supp.; 93 L.J.P. 97; 131 L.T. 482. H
(4) *Hetherington* v. *Hetherington* (1887), 12 P.D. 112; 3 Digest 366, *71*; 56 L.J.P. 78; 57 L.T. 533.
(5) *Andrews* v. *Andrews & Chalmers*, [1924] P. 255; Digest Supp.; 93 L.J.P. 137; 132 L.T. 400.
(6) *Mart* v. *Mart*, [1926] P. 24; Digest Supp.; 95 L.J.P. 29; 134 L.T. 446.

APPEAL by way of case stated by the stipendiary magistrate for Miskin Higher, Glamorgan, for the opinion of the King's Bench Division of the High Court of Justice. On July 22, 1937, at a court of summary jurisdiction sitting at Mountain Ash, Glamorgan, a complaint was made by the respondent against the appellant, alleging that she was delivered of a bastard child on June 20, 1937, of which the appellant was the father. Upon the hearing of the complaint, the following facts were proved or admitted :

(*a*) That the respondent was lawfully married on Apr. 22, 1930, to Joseph Frederick Norman, who was still alive.

(*b*) That on or about Oct. 3, 1935, the respondent laid a complaint against her husband, alleging that he had deserted her and her two children on Sept. 8, 1935, and the said complaint was heard at Willesden police court on Oct. 17, 1935, when the court made an order that the husband should pay a total sum of 30*s*. per week for the maintenance of his wife and her two children, but the order did not contain a provision that the respondent be no longer bound to cohabit with her husband.

The respondent gave evidence that the appellant had had sexual intercourse with her on two occasions—namely, on a date unknown in Sept., 1936, and on Oct. 7, 1936—that, when he called at her house on June 24, 1937, and was asked if he would take the child, he said that he had a good home for her at his place, and would do so, and that, when told by the respondent's mother that he was the father of the child, he said that he would have come to see the respondent sooner, if she had told him sooner. No evidence of non-access by her husband was given by or on behalf of the respondent. No evidence was given by or on behalf of the appellant, who relied upon the following contentions :

(i) That, as the order obtained by the respondent against her husband on Oct. 17, 1935, did not contain a provision that she be no longer bound to cohabit with him, it was essential in law that the respondent should call independent evidence of non-access by her husband, that such evidence was a condition precedent to the respondent proceeding with her case, and that she ought not to be allowed to give evidence against the appellant before the preliminary issue of non-access was decided in her favour, and that no such evidence had been given.

(ii) That, as the respondent was a married woman, the child born on June 20, 1937, was presumed to be the child of her husband, and that, in the absence of evidence of non-access by her husband, the appellant could not be adjudged the putative father of the child referred to in the complaint.

(iii) That the order obtained by the respondent on Oct. 17, 1935, could be discharged by her husband making a *bona fide* offer to resume cohabitation with the respondent.

The following authorities were cited in support of these contentions : *Russell* v. *Russell* (3), *Hetherington* v. *Hetherington* (4), *Andrews* v. *Andrews & Chalmers* (5), *Mart* v. *Mart* (6). The magistrate declined to accept the contentions made on behalf of the appellant, and held that the rule of the presumption of legitimacy of the child as laid down in *Russell* v. *Russell* (3) was not applicable, and therefore the respondent could give evidence tending to bastardise her child. He accordingly adjudged the appellant to be the putative father of the respondent's child, and made an order accordingly.

The magistrate desired to call the attention of the court to *Stafford* v. *Kidd* (1), where LORD HEWART, L.C.J., quoted with approval the following passage from the judgment of BATESON, J., in *Mart* v. *Mart* (6) :

> It is argued . . . that the court cannot look at the deed of separation because it

offends against the rule in *Russell* v. *Russell* (3). I do not think it does so offend. It is an ordinary deed of separation with a covenant to live separate and apart, and in fact the parties did live apart under it. I think that the deed has the same effect as a judicial separation. It separates the two parties by their own agreement instead of by the order of the court. It has been decided that where there has been a judicial separation it is presumed, in the absence of evidence to the contrary, that there has not been access between the spouses after the date of the decree, and that, therefore, where a child is born more than nine months after the date of the decree, the presumption of legitimacy does not arise. I think that a deed of separation has the same effect.

Graham Brooks for the appellant.
William Latey for the respondent.

Lord Hewart, L.C.J. [after stating the facts]: It appears that the magistrate was of opinion that the present case was similar to *Stafford* v. *Kidd* (1), but in my opinion there is not merely some difference, but all the difference, between the two cases. In *Stafford* v. *Kidd* (1), it was held by this court that the execution of a deed of separation, together with evidence that it had been acted on by the parties, was sufficient to rebut the legal presumption of access and of the legitimacy of a child born during the marriage but conceived during a period when the spouses were living apart under the deed. The point which was taken in the present case with success before the magistrate was that for that purpose a mere order of maintenance was on the same footing as was a deed of separation acted on by the parties. It is quite obvious that the two things are different. All that *Stafford* v. *Kidd* (1) decided was that, as had been previously decided in other cases, the effect of a deed of separation, together with evidence that it had been acted upon by the parties, was the same for the purposes of that case as that of a decree of separation. Here we have nothing but the fact that a maintenance order was made which did not contain a provision that the respondent was no longer bound to cohabit with her husband. There is a long line of authority—not merely *Rimmer* v. *Rimmer* (2), which was referred to in *Stafford* v. *Kidd* (1)—which shows that, if we were to take the step which we are invited to take, we should be going very far indeed. We are really being invited to make a new departure of an extremely far-reaching kind. In my opinion, it is impossible to accept the argument that this mere order of maintenance is on the same footing as is a decree or deed of separation which is shown to have been acted on by the parties, and I think that the magistrate came to an erroneous conclusion in point of law, and that this appeal must be allowed.

Branson, J.: I agree.

Humphreys, J.: I agree.

Appeal allowed.

Solicitors: *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellant); *Bell, Brodrick & Gray*, agents for *W. J. Canton*, Dowlais (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

WESTRIPP *v.* BALDOCK.

[King's Bench Division (Tucker, J.), **May 16, 17, 18, 1938.]**

Trespass—Adjoining owners—Ladders and planks placed against wall—Damage.

Sale of Land—Restrictive covenants—Covenant against trade—Jobbing builder—Definition of warehouse.

The plaintiff and the defendant occupied adjoining houses included within a building scheme, and the restrictions were enforceable by either of them against the other. The material restriction was that on no lot should any building be erected as a shop, warehouse or factory, or any trade or manufacture be carried on or any operative machinery be fixed or placed. The defendant was a jobbing builder, and placed ladders, planks, sand and such like against the side wall of the plaintiff's house. At the rear of the house, the defendant had erected a shed touching, or nearly touching, the plaintiff's garden wall. In front of the shed was a lean-to sloping away from the plaintiff's wall. It was closed on one side by the fact that it joined the shed, but was otherwise open. This was used as a store for builders' fittings. The plaintiff brought this action alleging a technical trespass, damage by damp through the pointing being injured by these articles, and breach of the restrictive covenant by the erection of a warehouse and the carrying on of a trade. The defendant alleged that the covenant was no longer binding, owing to change of the neighbourhood :—

Held : (i) the placing of the ladders and other articles against the wall was a technical trespass which had damaged the pointing, and the plaintiff was entitled to the cost of repointing the wall.

(ii) the shed and lean-to did not constitute a warehouse.

(iii) the defendant was carrying on a trade within the meaning of the covenant, as the business of a jobbing builder involved the buying and selling of materials, and the plaintiff was entitled to an injunction.

(iv) the neighbourhood, being still mainly residential, had not suffered such a change as would release the covenant.

[EDITORIAL NOTE. This case applies principles of law, which in general have previously been considered with reference to larger matters, to the circumstances of a small trader and his neighbour in a very ordinary street. For this reason, the case will probably be found of more value and interest than it would have been if it had concerned larger affairs. The plaintiff has fashioned his claim upon every conceivable ground of attack, and the judgment deals fully with each aspect of the claim.

As to Covenants Against Carrying On a Trade, see HALSBURY, Hailsham Edn., Vol. 20, pp. 227-229, paras. 249, 250 ; and for Cases, see DIGEST, Vol. 40, pp. 321, 322, Nos. 2722-2724.]

Cases referred to :

(1) *Buckingham* v. *Fulham Corpn.* (1905), 21 T.L.R. 511 ; 24 Digest 920, *143*.

(2) *Middleton* v. *Wade & Son* (1905), cited in 53 W.R. at p. 629 ; 24 Digest 920, *144*.

(3) *Harris* v. *Amery* (1865), L.R. 1 C.P. 148 ; 43 Digest 7, *23* ; 35 L.J.C.P. 89 ; 13 L.T. 504.

(4) *Wheatley* v. *Smithers*, [1906] 2 K.B. 321 ; 43 Digest 7, *21* ; 75 L.J.K.B. 627 ; 95 L.T. 96 ; *revsd.* on other grounds, [1907] 2 K.B. 684.

(5) *Chatsworth Estates Co.* v. *Fewell*, [1931] 1 Ch. 224 ; Digest Supp. ; 100 L.J.Ch. 52 ; 144 L.T. 302.

(6) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, *311* ; 37 L.J.Ex. 161 ; 19 L.T. 220 ; *affg.* (1866), L.R. 1 Exch. 265 ; *revsg.* (1865), 3 H. & C. 774.

Action for damages for breach of covenant, trespass and nuisance, and also for an injunction restraining the defendant from maintaining or erecting on land known as 43, Nelson Road, any building as a shop, warehouse or factory, or carrying on thereon any trade or manufacture, or fixing or placing thereon any operative machinery. The plaintiff also claimed an injunction restraining the defendant: A

> from casting placing leaning stacking or depositing any sand ladders poles steps planks doors or other building materials against the plaintiff's wall.

He claimed a further injunction restraining the defendant "from repeating or continuing the nuisance complained of in" his statement of claim, such nuisance consisting of the making of noises which rendered his residence uncomfortable and unpleasant to live in. B

W. Arthian Davies for the plaintiff.

E. B. Gibbens for the defendant.

C

Tucker, J.: Mr. Westripp is the next-door neighbour of Mr. Baldock, the defendant, and it is common ground that, when Mr. Baldock acquired his premises, they were taken by him subject to the burden of the covenant which is contained in an indenture made on Aug. 29, 1874, whereby the purchaser of the land covenanted D

> that nothing shall ever be erected fixed placed or done upon the land as to which they respectively covenant in breach or violation or contrary to the fair meaning of the said stipulations.

"The said stipulations" are contained in the second schedule to that deed, and the material stipulation is No. 3, which is in these words: E

> On no lot shall any building be erected as a shop warehouse or factory, or any trade or manufacture be carried on or any operative machinery be fixed or placed.

The defendant went into occupation of these premises, No. 43, Nelson Road, Gillingham, Kent, in 1931. The plaintiff is, and has been since 1910, the owner and occupier of No. 47, Nelson Road, Gillingham, which is next door to the defendant's house. F It is common ground that the covenant which I have read is one which was imposed pursuant to a building scheme, that it binds the land occupied by the defendant, and that the plaintiff, whose land is subject to a similar covenant, has the benefit thereof as against the defendant, and can enforce it if it has been broken. G The plaintiff alleges that it has been broken by the erection on a passageway between the two houses of what amounts to a warehouse within the meaning of the covenant. He further says that, if he is wrong with regard to that, or additional to that, the defendant is carrying on a trade, the words of the covenant being: H

> On no lot shall any building be erected as a shop warehouse or factory, or any trade or manufacture be carried on . . .

He furthermore complains that, apart from the breach of covenant, certain acts of trespass have been committed against his premises, by reason of the fact that the defendant has placed certain materials and

appliances which he uses in connection with his business—to use a neutral word—as a builder and decorator, consisting of ladders, planks, sand and such like, against the side wall of the plaintiff's house. He says that, by reason of these articles being placed against the side of his house, not only has a technical trespass been committed, but also
A injury has been done to the pointing on the wall, and damp has entered into the dining-room, the scullery and the kitchen at the back. He claims damages for those acts of trespass, and also an injunction restraining repetition thereof. Then he further claims that what the defendant is doing on this land has constituted a nuisance, by reason of the noise.

B To take that first, there has been certain evidence before me to the effect that the men who work at, or frequent, this builder's yard from time to time sometimes make noises, dropping planks, slamming doors, and so on, and that once in six months or so a heavy lorry enters the yard, and sometimes other noises come from it. The plaintiff has failed
C to satisfy me, however, that what is being done in that yard, in so far as noise is concerned, amounts in law to a nuisance for which he can get damages or an injunction. That there may sometimes be a little annoyance is one thing, but I am satisfied that there is nothing being done here, so far as noise is concerned, which really appreciably interferes
D with the ordinary enjoyment of the plaintiff's property.

I proceed to deal with his claim for damages for trespass. As to that, it is really admitted that there have been acts of trespass committed against his side wall, but Mr. Gibbens, for the defendant, says that they were really only technical acts of trespass, which have been remedied
E since the writ was issued, that there is no danger of any repetition, and that at most the plaintiff can recover nominal damages for such acts of trespass. I am satisfied, not only that these acts of trespass have been committed in the past, but also that they have continued to be committed since the issue of the writ. That is the view which I take,
F on the verbal evidence which has been given, and also from the photographs which have been put in evidence. The defendant says that, since the issue of the writ, he has erected boards which keep all his materials at least 2½ ins. away from the wall. I think that it is clear from the evidence and from the photographs that—at any rate in some
G instances—his goods have been piled against the wall even since the issue of the writ. The lower part of the pointing on this side wall has been quite appreciably damaged by these acts of trespass, and fresh pointing is required, which will cost £12 10*s.* I think that the plaintiff is undoubtedly entitled to recover that sum of money in any event. He
H complains that the damp which has entered the dining-room, the scullery and the kitchen is also due to what the defendant has done. The suggestion is that the damp has entered by reason of sand having been placed against the wall, that the sand has got wet and that the damp has penetrated the 9-in. wall, which is a wall without a cavity. As to that, the defendant contends that it is essential to a builder to have

dry sand, that his sand has always been dry, and would be of no use to him if wet, and that, in any event, he has had only a very small quantity of it. With regard to that part of the case, I am not satisfied that it has been proved beyond all reasonable doubt that the damp which has entered the plaintiff's premises has been in fact caused by these acts of trespass on the part of the defendant. I think that there is a considerable amount of suspicion that it may have been, but I am not altogether satisfied with regard to that, and I therefore limit the plaintiff's damages for trespass to the sum of £12 10*s.* I think, however, that, in respect of those acts of trespass, he is also entitled to an injunction. I do not accept the evidence that the matter has been remedied since the issue of the writ. I am satisfied that acts of trespass have been repeated, and I think that, when one looks at the state of affairs shown in the photographs, it is almost inevitable that such acts of trespass will continue to be repeated, or must almost inevitably be repeated, unless the defendant erects some wall or other means effectively preventing his goods, which he allows to be strewn about this yard in considerable quantities, from coming into contact with the plaintiff's wall. Therefore on that part of the case the plaintiff is entitled to £12 10*s.* damages, and to an injunction.

I ought to add that, at the rear of the premises, there is a shed, which, it is alleged, just leans upon the plaintiff's garden-wall. The evidence with regard to whether it touches or not is conflicting, and Mr. Davies, for the plaintiff, agrees that in respect of that act of trespass he has really suffered only a technical damage, and does not ask for an injunction on the ground of trespass alone in respect of the position of that shed. I think that for that act of trespass, which I am satisfied does amount to a technical trespass, the case would be sufficiently met by adding a nominal sum of 10*s.* to the damages I have already awarded, and I shall grant no injunction in regard to the shed.

Now comes a much more serious part of the case—namely, as to whether there has been a breach of covenant by the defendant, in that what he has done amounts to the erection of a warehouse, or on the ground that on those premises he is carrying on a trade. With regard to the question of whether or not the erections in that yard amount to a warehouse, I do not think that it is necessary or desirable that I should attempt to give a definition of what is a warehouse, but I do not think that this yard in its present condition does amount to a warehouse. I leave aside for the moment the shed at the back. I do not think that there is any real evidence before me as to what is in that shed, but there is a shed at the back. In front of the shed, the photographs show that a lean-to has been put up, consisting of a sloping roof erected on some woodwork sloping away from the plaintiff's wall. It is a sort of contrivance that affords a certain amount of protection from the weather to wood or other articles placed underneath it. It is closed on one side by the fact that it joins the shed at the end. It is shut in on the other side by the plaintiff's wall. It is open on two sides, and is really nothing more nor less than a piece of corrugated iron sloping away from the wall. There has been a similar kind of erection, rather larger and more substantial, towards the front of the premises, and it is clearly shown in the photographs. It really is a large shelf, on the top of which there are displayed certain utensils—sinks, cisterns and lavatory pans—and that shelf also affords a protection to the materials lying underneath it, as shown in photograph No. 10. Use is made of the plaintiff's wall again as forming one wall of this erection, so that it is in effect something which has a roof and one wall, open on all the other three sides, and there is no means, of course, of closing it in any way whatever. Thus, the yard is really, to all intents and purposes, a builder's open yard, certain parts of it being covered in by something in the nature of a roof. So much for the nature of the erections. With regard to what is put underneath these pieces of wood, the defendant is a jobbing builder and decorator, who does most of his work in other people's premises, and in connection with his business, of course, it is necessary for him to have a number of ladders, planks, trucks, odd pieces of wood, and such like. A man carrying on that business also inevitably collects a certain amount of fireplaces and things of that kind which come out of old houses, the kind of materials which can be seen in the photographs, and such as are always to be seen in any small builder's yard. The goods consist primarily, however, of the tools of his trade, so to speak—namely, ladders and so forth. It is true that there have been small quantities of cement, and a certain quantity of bricks, but I am satisfied on the evidence that the defendant does not keep his building materials here, that he buys them from builders' merchants, and that this yard is primarily used for housing his ladders and the tools of his trade. He also displays on that shelf these unpleasant objects, to which the plaintiff not unnaturally objects, for the purpose of showing the kind of fixtures which he is able and willing to supply. They are really signs. Incidentally, they are placed on the top of this shelf, and, if it is a warehouse, they are placed on the top of the roof of the warehouse. I do not think that this yard, in the condition which I have described, containing the articles which I have indicated, can be said to be a warehouse. I do not think that a yard which cannot be closed in, and which merely contains the tools of a man's trade, and a few other incidental articles which he acquires inevitably in connection with his trade, amounts to a warehouse, and I am satisfied on the evidence that this yard is not a warehouse. I have been referred in that connection to *Buckingham* v. *Fulham Corpn.* (1). That was an appeal from the decision of the county court judge, and it is quite true that the court took the view that it was a question of fact for the county court judge and that he had not misdirected himself. COZENS-HARDY, L.J., in giving his judgment, is reported as saying, at p. 512:

> He did not intend to be rash enough to attempt to define the meaning of the

> word "warehouse" in this Act [the Factory and Workshop Act, 1901], but the word seemed to him to involve the idea of a place where goods were stored for sale or at least for some other commercial purpose. A building might well be a warehouse if the contents were there for the purpose of sale, whereas the same building might not be a warehouse if the contents were there for consumption only. It was, in his opinion, not enough to make the building a warehouse because it might be found to contain certain more or less incidental products which might possibly happen to be disposed of by sale. That was the case here. This court had already held (*Middleton* v. *Wade & Son* (2)) that it was not enough to say that a certain space was used for storing purposes, for it had held that the particular timber yard in that case where goods were stored for commercial purposes was not necessarily as a matter of law a warehouse. That involved this, that a mere open piece of ground, even though goods might be there for commercial purposes, was not necessarily as a matter of law a warehouse.

In *Buckingham* v. *Fulham Corpn.* (1), it was an open yard which was in question. The county court judge found that the yard was not a warehouse. Of course, the facts of that case were different from the facts in the present case, but I think that it does give some indication of the view which the Court of Appeal took as to what was necessary for premises to constitute a warehouse.

I turn, therefore, to the question whether or not there has been a breach of the covenant, in that the defendant is carrying on a trade upon the premises. It is to be observed that he advertises, as is shown by the photographs:

> W. Baldock, Builder & Decorator, General Repairs. Bricklaying, Plastering, Cementing, Pointing, Slating, Paperhanging, Sanitary Work, Alterations, Painting, Joinery. Bricks, Ballast, Cement, Lime, Mortar, Sand, Slates, Coppers, Sinks, Stoves, Ranges, etc., supplied and fixed. Ladders on hire.

Then there is the word "Enquiries," with a hand pointing to the door of his house. He carries on the business of what is called a jobbing builder, which involves doing work at places other than this—work of repairing, building, and decorating—and supplying materials. When he sends in his account, it will no doubt consist partly of work done and partly of materials supplied, which he obtains from builders' merchants, and which he does not actually keep on these premises. None the less, his business—and I am using the word "business" to avoid the use of the word "trade," which is the thing I have to decide—inevitably consists of selling goods as well as doing work, and these premises are the seat of his business. It is true that the actual sale of the goods may not take place at these premises, but here is where he receives the orders for work which he is to do. These are his headquarters, and here he keeps the implements and tools of his business. In those circumstances, reference has been made by counsel on each side to what view the man in the street would take as to whether or not that constituted him a trader. I do not know that I need have regard to what the man in the street would think, but, in my view, unless there is some authority which compels me to hold to the contrary, what he is doing on those premises is exercising a trade. I do not know what else it can be said that he is doing. It is said, however, that the authorities show that there is a distinction between a trade and a business. I think that that is no doubt so where the words are used in contradistinction to each other, and that " business " has a wider meaning than " trade." It is further said that the authorities show that the word " trade " necessarily implies the process of buying and selling. Be that as it may, I think that the business which this man is carrying on here is one which does involve buying and selling, and the fact that he may not buy or sell on these particular premises does not prevent him from being a trader who is exercising his trade at these premises by keeping his implements there, by taking orders there, by displaying advertisements there, and also by displaying samples of the goods which he is prepared to supply and fix.

I ought perhaps to refer to the authorities which have been quoted to me in this connection. One was *Harris* v. *Amery* (3). In that case, the question was whether a partnership of more than twenty persons for carrying on the business of farming is within the Companies Act, 1862, s. 4. The decision in that case was merely whether farming constitutes the carrying on of a business. WILLES, J., said, at pp. 154, 155 :

> It should seem by the Companies Act, 1862, that the legislature, viewing the frauds which had been committed by large companies, and the great inconvenience which was found to arise by reason of the difficulty of enforcing claims and settling accounts between surviving members and executors of deceased members, and otherwise, have thought fit to determine that no company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company or its members, unless registered under the Act. And I think it has done that by language which does not admit of any reasonable doubt. It is unnecessary to refer to authorities to show that " business " has a more extensive signification than " trade." The earlier Bankrupt Acts did not embrace farmers : but it was never doubted that farming was a " business," though not a " trade." Banking is not strictly a trade. Where land comes to a number of persons by operation of law, they cannot be said to be partners, and they may consistently with the Act farm it. But, when we find an association like this, which is rendered illegal by an Act of Parliament, we cannot take notice of the agreement under which they become tenants, for the purpose of establishing a right in a court of law, or hold that the occupation by one of their body is an occupation by all the members of the illegal association.

The decision in that case was, as I have indicated, simply that farming was a business, and it was not necessary for the purposes of that case to decide the precise limits of the word " trade." None the less, there is the expression of opinion of the judge that it indicated buying and selling. The next case was *Wheatley* v. *Smithers* (4). That was a decision of RIDLEY, J., and the headnote is as follows :

> An auctioneer is not a trader, and a partner in a firm of auctioneers has no implied authority to bind the firm by his acceptance of a bill of exchange in the firm name.

The actual question decided in that case, of course, was very different from the one which falls to be decided in the present case. None the less, RIDLEY, J., said, at p. 322 :

> I do not propose to attempt to give an exhaustive definition of what constitutes a trader, but I think that one important element in any definition of the term would be that trading implies a buying or selling. An auctioneer does not buy ; he does sell, but not his own goods, only those of other persons. If, therefore, buying and selling are essential features of trading, an auctioneer does not come within the definition.

Then he refers to what Willes, J., had said in *Harris* v. *Amery* (3). Accepting the view expressed by those judges, that the word "trade" generally at any rate implies that some part of the business involves buying and selling, I think that the business carried on by the defendant is one that does involve buying and selling, even if the buying and selling is incidental to the main part of his work—namely, the carrying out of A
building operations; that is to say, work done, as distinct from materials supplied. I cannot find anything in those cases which, in my view, compels me to hold, contrary to my natural inclination, that what the defendant was doing on these premises was the carrying on of a trade, the trade of a jobbing builder and decorator. Mr. Gibbens, for the B
defendant, contends that, even so, I ought not to grant an injunction restraining him from carrying on this trade, because this street and neighbourhood are now so different from what they were in 1874 that there is no longer any need for the protection of this covenant, and that it would be wrong and inequitable to grant an injunction to restrain its C
repetition. Several cases have been referred to, but I think it is sufficient if I now quote only what Farwell, J., has recently said in *Chatsworth Estates Co.* v. *Fewell* (5). The headnote of that case is as follows:

> In an action to enforce restrictive covenants against a purchaser with notice, bound only in equity, the defendant relied on two equitable defences, namely: D
> (*a*) a general change in the character of the neighbourhood; (*b*) an allegation that this change was brought about by the acts or omissions of the plaintiffs or their predecessors. Held (*a*) In order to succeed on the first ground the defendant must show so complete a change in the character of the neighbourhood as to render the covenants valueless to the plaintiffs, so that an action to enforce them would be unmeritorious, not *bona fide*, and merely brought for some ulterior purpose. (*b*) In order to succeed on the second ground the defendant must make out a sort of estoppel by showing that the plaintiffs' acts and omissions were such as to justify E
> a reasonable person in believing that the covenants were no longer enforceable.

In giving judgment, Farwell, J., said, at pp. 229, 230:

> The defendant's first ground of defence is that there has been such a complete change in the character of the neighbourhood, apart from the plaintiffs' acts or omissions, that the covenants are now unenforceable. But to succeed on that ground the defendant must show that there has been so complete a change in the F
> character of the neighbourhood that there is no longer any value left in the covenants at all. A man who has covenants for the protection of his property cannot be deprived of his rights thereunder merely by the acts or omissions of other persons unless those acts or omissions bring about such a state of affairs as to render the covenants valueless, so that an action to enforce them would be unmeritorious, not *bona fide* at all, and merely brought for some ulterior purposes. It is quite impossible here to say that there has been so complete a change in the character G
> of this neighbourhood as to render the covenants valueless to the plaintiffs. Whether right or wrong the plaintiffs are bringing this action *bona fide* to protect their property, and it is hopeless to say tha the change in the character of the neighbourhood is so complete that it would be useless for me to give them any relief.

In the present case, I am satisfied from the evidence that this street, Nelson Street, was in 1874, and now is, a residential street. It is quite H
true that there are a few shops or business premises in the street, but they are few in number. There is a big bus garage at one end, and some other business, the nature of which I forget at the moment, at the other. It is a street about 900 yds. in length, and the vast majority of the houses are small residential houses. There are 186 residential houses,

and out of that number no less than 88 are owner-occupied. There are some lock-up garages opposite the plaintiff's and defendant's houses, and there is another builder's yard some few hundred yards away. The evidence altogether fails to satisfy me, however, that there has been any appreciable change in the nature of the neighbourhood. People who live in those houses now may not be quite so well-to-do as were the people who lived in them in 1874. The street has recently, with the exclusion of these two shops or garages at each end, been town planned as a residential street. The scheme has not actually been approved by the Minister yet, but it has been submitted to him, and that confirms the view which the evidence otherwise gives me that this is still a residential street, as it was in 1874, and that nothing has happened to make it unreasonable for the owner of a house in this street to desire to protect his property by preventing the street from gradually becoming commercialised. Therefore, though one naturally regrets having to give a decision which affects a man's livelihood, the carrying on of his business, I am satisfied in this case that there has been a breach of the covenant, that it was a covenant for the protection of the plaintiff's property, and that it would be quite inadequate to deal with this case merely by the award of damages.

I therefore think that the result of my findings is that the plaintiff is entitled to the sum of £13 damages, and that he is also entitled to the first two injunctions that he claims, except that I think that the first injunction should be limited to the carrying on of any trade, and should not mention any warehouse or factory or other things. That injunction will therefore be to restrain the defendant, his servants or agents from carrying on any trade on the land known as 43, Nelson Road. The second injunction will be as prayed.

I ought perhaps to add that an amendment was made to the pleadings whereby relief was sought also on the ground of the rain-water having done damage, by accumulating on the roof of one of these lean-to sheds and thereby causing damage, on the basis of *Rylands* v. *Fletcher* (6). As to that, I am not satisfied that this roof on this lean-to shed did have the effect complained of—of making the wall damp. In fact, I think that the probability is that, so far from doing that, it acted as a protection to that wall against the weather. The result of my judgment must therefore be that there will be judgment for the plaintiff for £13 and for the injunctions which I have indicated, with costs.

Solicitors: *Ince, Roscoe Wilson & Glover*, agents for *Kenneth Redfern & Co.*, Gillingham, Kent (for the plaintiff); *H. Flint & Co.* (for the defendant).

[*Reported by* GERALD ABRAHAMS, ESQ., *Barrister-at-Law.*]

AERIAL ADVERTISING CO. *v.* BATCHELORS PEAS, LTD. (MANCHESTER).

[King's Bench Division (Atkinson, J.), **May 6, 9, 16, 1938.**]

Contract—Performance—Performance in manner that must bring other party into contempt—Frustration.

Damages—Breach of contract—Whether general damages can be awarded.

The plaintiffs and defendants entered into a contract whereby the plaintiffs were to advertise the defendants' goods by flying over various towns trailing behind the aeroplane words advising the public to buy the defendants' products. The defendants agreed to pay £500 for two tours of 25 hours each, excluding dead time, the hours to be distributed as the defendants wished, and at dates and times which they approved. There were to be 25 miles of free flying between each town, and any extra mileage was to be paid for. Schedules of times and places were agreed, but it was recognised that exact compliance with these was dependent on the weather. It was agreed that the pilot was to keep in close touch with the defendants and was each day to telephone to get their approval of what he proposed to do, and to send a report of what he had done. This he did until Nov. 10, 1937. No telephone communication was received from the pilot after Nov. 9, nor were any arrangements made for flights on Nov. 11. At about 10.45 a.m. on Nov. 11, the defendants' representative saw the pilot flying over Manchester and Salford while the Armistice services were in progress, and the pilot flew over the crowded main square in Salford during the two minutes' silence, to the horror and indignation of the thousands of people there. The result of this flight was a vigorous denunciation of the defendants and the receipt of many letters announcing that their goods would be boycotted. The defendants immediately placed advertisements in several of the chief newspapers circulating in the district, and letters of explanation and apology were written to the newspapers by the plaintiffs and the pilot. As a result of this flight there was a marked drop in the demand for the defendants' goods. The plaintiffs sued the defendants for £170 7*s.* 11*d.* in respect of part of the advertising done under the contract, and the defendants counterclaimed for damages, and for a declaration that they were no longer bound by the contract. The plaintiffs contended that unreasonable expense had been incurred by the defendants in advertising, and that only special and not general damages should be given for pecuniary loss in respect of breach of contract. They contended that the contract could still be performed at a later date and in a different locality:—

Held: (i) the expenditure incurred in advertising was reasonable in the circumstances.

(ii) general damages were recoverable for pecuniary loss sustained in respect of the breach of contract.

(iii) it was commercially wholly unreasonable to carry on with the contract, and the defendants were released from further performance.

[EDITORIAL NOTE. Apart from the special interest of this case as referring to a new method of advertising, it is of considerable importance upon the question of damages for breach of contract. An attempt was made to restrict the damages recoverable for breach of contract to special damage or, at any rate, to damage which could be precisely proved. This view has been rejected, and, so long as a loss can be proved, it is immaterial that it cannot be calculated with precision. On the other hand, an actual loss must be proved, and not a damage to reputation. It will be noted that in the present case there was such a wrongful performance of the contract as amounted to a frustration, and the other party was entitled to treat the contract as at an end.

As to Damages in Contract, see HALSBURY, Hailsham Edn., Vol. 10, p. 121, para. 151; and for Cases, see DIGEST, Vol. 17, pp. 130-135, Nos. 380-412.

As to Frustration of Contract, see HALSBURY, Hailsham Edn., Vol. 7, pp. 215-217, para. 296; and for Cases, see DIGEST, Vol. 12, pp. 386-404, Nos. 3172-3252.]

Cases referred to:

(1) *Groom* v. *Crocker*, [1938] 2 All E.R. 394; Digest Supp.

(2) *Wilson* v. *United Counties Bank, Ltd.*, [1920] A.C. 102; 17 Digest 155, *562*; 88 L.J.K.B. 1033.

Action for £170 7*s.* 11*d.* for work and labour done for the defendants. The defendants, subject to their counterclaim, did not dispute the plaintiffs' claim. By their counterclaim they claimed a declaration that they were no longer bound by a contract into which they had entered with the plaintiffs, and damages for the plaintiffs' alleged negligence and breach of contract. They claimed to set off those damages against the sum claimed by the plaintiffs. The defendants' case was that in Oct., 1937, they entered into a contract with the plaintiff firm, whereby the latter undertook to advertise the defendants' peas by flying an aeroplane towing a trailer over certain great cities, districts and towns in various parts of the United Kingdom during a period of nine months, due to expire in July, 1938. The defendants said that it was the plaintiffs' duty to carry out the aerial advertising so as to secure advantageous publicity for the defendants' peas, and that it was an obligation on the plaintiffs that they should do nothing calculated to injure the reputation, goodwill or property of the defendants. The defendants complained that the plaintiffs so negligently managed their business that, without instruction or authority to do so, during the two minutes' silence, on Nov. 11, 1937, they flew an aeroplane over Manchester, trailing a large streamer bearing the words "Eat Batchelor's Peas," with the result that they caused widespread public indignation and highly damaging press publicity, the result of which, so the defendants alleged, was, and would be, serious injury to their business, their goodwill, and the reputation of their peas.

In their reply the plaintiff firm said that it was an implied term of the contract that, if, for any reason whatever, the defendants required the plaintiffs' pilot not to fly at any particular time, they should communicate the fact to him. They contended that at the material time the aeroplane was flown in compliance with the terms of the contract.

A. W. Roskill for the plaintiffs.

G. J. Lynskey, K.C., *Richard A. Willes* and *J. D. Cantley* for the defendants.

Atkinson, J.: This is an unusual sort of action arising out of a contract made by the defendants, Batchelors Peas, Ltd., with the Aerial Advertising Co., whereby the latter company was to advertise the defendants' goods by flying over various towns trailing behind the aeroplane words which everybody could read advising the public to purchase Batchelor's peas. The plaintiffs, the Aerial Advertising Co., sue the defendants for £170 7*s.* 11*d.* in respect of part of the advertising done under this contract. That is admitted subject to the counterclaim, and the counterclaim is based on the fact that the plaintiffs were guilty of conduct which entitles the defendants to damages and which entitles them also to treat the contract as at an end.

The defendants, a very well-known firm, are producers of dried and tinned vegetables, and one of the main parts of their business is the sale of dried peas. In the past they found advertising by means of aeroplanes a success, and on Oct. 13, 1937, Mr. Batchelor and Mr. McDowell, of the defendants, saw Captain Michelmore, one of the partners in the plaintiff company, and an oral bargain was made which was, at any rate in part, confirmed by two letters which passed between the parties. The bargain, to put it quite shortly, was this. The defendants were to pay £500 for 50 hours' flight, and the hours were to be distributed over two tours of 25 hours each. The 25 hours were to be reckoned with regard to the time spent in flying over the agreed towns—it did not include the "dead" time—and were to be distributed as the defendants wished, on dates which they approved and at times which they approved. One rather important matter to remember is the question of "dead" flying-time. One of the terms arranged was that there was to be a distance of 25 miles free flying between each town, but that after that any further mileage was to be paid for. A schedule was agreed at this interview with reference to the first tour. It was to begin with two flights at Birmingham, and then there were to be flights over towns in the Potteries, going on to Chester, Liverpool, Birkenhead, Wallasey, St. Helens and Warrington, and ending up with Manchester and then Sheffield. Two hours, I gather, was to be the minimum time flown over any town. Although this schedule was agreed as to dates and times, it was recognised, of course, that it was all dependent upon the weather, and that it would be a schedule to which it would be very difficult to adhere with any rigidity or any certainty. I am quite satisfied that it was agreed that the pilot of the aeroplane was to keep in close touch with the defendants, that he was to telephone each day to get their approval of what he proposed to do—what the weather permitted him to do—and that each day he was to report as to what he had done.

I am satisfied that there were two reasons, which Mr. Batchelor explained to Captain Michelmore, why he must be kept in close touch with what was done: (i) because he wanted to approve or disapprove of any suggested time or date, and (ii) because he regarded it as very important that he should always have the opportunity of notifying his representative in any town over which it was proposed to fly, so that he should be on the look-out, and see that the advertisement was properly carried out, and be able to take full advantage of it. I am satisfied about that, because Mr. Batchelor says it, Mr. McDowell says it, and

Captain Michelmore agrees in the clearest way about it. He said that it was agreed that dates and times should be subject to their approval. It is pleaded in the defence, and I have no doubt that that part of the contract is established.

As was expected, the weather was not satisfactory. It was worse than A expected as a possibility. They were hung up several days with fog and cloud before they could begin flying at Birmingham. The pilot did exactly what had been arranged. Every morning he rang up and asked if it would be right for him to fly in the afternoon instead of in the morning, since Mr. Batchelor had expressed the view that between B 10 a.m. and 12 noon were the best hours. The pilot, as I say, rang up every morning and inquired, and, upon that, arrangements were made as to what was to be done. Each day he sent a report saying what had happened. Unfortunately, he never gave an address, and they never knew where he was, but each day he took his aeroplane to some con- C venient aerodrome. However, the contract went on all right until the morning of Nov. 9. Up to that date, the pilot had telephoned every morning telling the defendants what he was going to do, and had obtained their approval as to what he proposed. There had been very little flying, at that time, between 10 a.m. and 12 noon, because D the weather had been so uncertain. The weather, however, improved, and, on the morning of Nov. 9, he telephoned, as it now turns out, from Speke Aerodrome at Liverpool, from which he was doing the Chester flight. He telephoned and suggested that he should do Chester that morning and one of the two Liverpool flights that afternoon, and that, if E the fine weather continued, he should do the second Liverpool flight the following morning, and the St. Helens flight the following afternoon. Not a word was said as to anything beyond that. Mr. Batchelor agreed, and that was done. The telephone message on Nov. 9 was the last. Until then, I think the pilot had telephoned every day, F Reports were sent in. There was one sent on the evening of Nov. 9 saying that the Chester flight and the first Liverpool flight had been done. He says the second Liverpool flight, but I think that that is a mistake for the first. Then, on the evening of Nov. 10, there was another report, saying that the Liverpool flight and the St. Helens flight had both been G done, ending up with the words: "Proceeding to-morrow to Manchester." We know that on the evening of Nov. 10 he had gone to some aerodrome near Manchester, but the defendants were not aware of that.

The pilot failed to make any arrangement whatever about Manchester. The last message the defendants had from him was on the morning of H Nov. 9, when he had made arrangements for Nov. 9 and Nov. 10, but no arrangement of any kind was made in reference to Nov. 11, and, in view of what I think was a term of the bargain, such hopeless departure from the schedule having been made, I think that it was a breach of the contractual obligation for him to fly on Nov. 11 without first communicating with the defendants and saying what he proposed to do and asking if they approved, when they would have had the chance of saying yes or no. That is what happened.

Going back to the contract, the only other point relevant to interpretation is, I think, this. There must be implied in that contract a term that the flying under the contract would be carried out with reasonable skill and with reasonable care, having regard to the object of the contract, and, in whatever precise words the implied obligation is expressed, it must be, I think, certainly wide enough to exclude flying in a way which would bring the advertisers into hatred and contempt. For example, it would certainly exclude, in my view, flying low, so as to annoy, irritate and frighten people. I think that that sort of flying would have been a breach of the covenant. What is relied on by the defendants here is this. They say : " There was a breach of that obligation to notify us and obtain our approval before flying in any particular place." Secondly, they say that there was a breach of the implied obligation to fly with reasonable skill and care, and to carry out the contract with reasonable skill and care having regard to the object in view. They say : " The defendants gave no notice whatever that the pilot was going to fly over Manchester on Nov. 11." Even the daily flying-report which they received that day merely told them that the pilot was proceeding to Manchester on that day. To his horror, their representative was told and saw for himself at about 10.45 a.m. on Nov. 11 that this machine was flying over Manchester and Salford while the Armistice services were going on, during the time which most people probably regard as the most sacred time of the year. It was perfectly hopeless to get at him or to communicate with him in any way whatsoever. The pilot flew about over the crowds in Albert Square and the main square in Salford, which, of course, was crowded with people during the two minutes' silence. One can well imagine the horror and indignation felt by the thousands of people congregated there.

The result was disastrous. Within a minute or two the telephone began ringing. All day long the manager in Manchester was listening to denunciation of the most vigorous type from various people who had seen the aeroplane. Next day letters were received telling them what people thought about them : " You are beneath contempt. Every decent-minded person will boycott your products." One can read through the 25 letters which have been produced, and in nearly every case one sees that the point of the letter is : " Your goods will be boycotted " ; " We will never buy your goods again " ; " I will see that your goods never enter my house," and that type of thing. Thereupon something had to be done, and had to be done quickly. What the defendants did was to arrange at once for an advertisement to be placed in several of the chief newspapers, and that was done at the earliest opportunity. They were all newspapers in which it was quite reasonable to advertise, well-known newspapers circulating in the district. Captain Michelmore wrote letters to the newspapers, and the pilot wrote letters to the newspapers, explaining and apologising. The pilot's explanation was that he had forgotten that it was Armistice Day. I have not the smallest doubt that, if he had remembered that it was Armistice Day, or that it was the time of the Armistice service, he would never have done it. I do not think that he would have been so wicked as that. At any rate, every **A** effort was made to put things right, and the defendants incurred an expenditure of £70 in advertising in that way.

The first question that arises is the effect of this upon the rest of the contract, because only half of the contract has been performed. There is another tour of 25 hours' flight provided for by the contract. Mr. **B** Batchelor says that it would be wholly unreasonable to expect him to carry out the second half of the contract, that the one thing he wants is to undo the harm which has been done and to let the whole thing be forgotten, and that, if any more flying were done advertising these goods, people would at once begin to say: "Oh, Batchelor's peas again. **C** Those are the people who flew on Armistice Day." In his view, any further use of this particular form of advertising would not merely do no good, but would actually serve to perpetuate the harm which has been done. I forgot to mention that the two flights had to be carried out during the succeeding nine months. Mr. McDowell was induced by **D** Mr. Roskill (and it is interesting to observe that this was the highest at which Mr. Roskill ventured to put it) to say that personally he did not think that it would do any harm to carry on in the south, but nowhere near Manchester and Salford. Captain Michelmore was very frank and very straightforward about this part of the case, as indeed **E** about every other part of the case. He said, and I think that his view is a reasonable one:

> I should not have asked them to take on another 25 hours' flight immediately afterwards. [That is, anywhere.] I think it would be unreasonable for some eight or nine months. I should imagine it would be sound advertising again in eight or nine months.

F Even he, however, did not suggest that it would be reasonable to fly again anywhere near Manchester.

I think that the principle which I have to consider is this: Did the conduct of the pilot make it wholly unreasonable for the defendants to be expected to carry out this contract? I do not think it is enough **G** for the plaintiffs to be able to say: "There was a way and a time at which this contract might have been performed with benefit to yourselves." The defendants had the right to an unfettered choice as to time and place. I think that they have a right to say: "The question is whether we can have this contract, not a different contract, carried out reasonably **H** from a business point of view." As to that, I cannot think that there can be two views. Take first the question of time. True, there is nine months in which they have a choice. The season begins somewhere about October, and ends in June or July, when the fresh vegetables are coming along. It is to be at their option, and naturally their option would be exercised in the early part of the season. Is it the same contract, however, if it can be reasonably performed only in June or July ? Is it the same contract as one which gives them the right to have the flights at any time they like ?

Then, again, one has to consider the district in which the advertising was to be carried out. In this connection, I think that it is important to remember that question of 25 hours' "dead" time. Where in England can one find a district which would supply so fruitful an area as would the one they flew over on the first occasion ? Within 25 miles in this area there are a number of the biggest towns in the country. Outside London, I suppose that Birmingham, Manchester and Salford and Liverpool are the biggest towns in the country. There they could advertise to hundreds of thousands or to millions of people without exceeding this 25 hours' "dead" flying time between each town. They had a perfect right to fly in the same area again, or to fly over part of the same area again. Once it is admitted that this conduct made it wholly unreasonable, from the business point of view, to fly over Manchester and the densely populated part of south-east Lancashire—the most densely populated part of the country outside London—it seems to me that they are entitled to say : "You cannot reasonably expect us to perform this contract." It was suggested that one way in which the contract might be carried out was to have flights, I think, over Plymouth, Portsmouth and Cardiff. Those towns, however, are many miles apart, and to make a tour of the kind contemplated over towns in South Wales and in the south would involve very heavy expenditure on "dead" flying-time. It seems to me, therefore, that, accepting Captain Michelmore's view about that, and Mr. Batchelor's, which do not seem to differ materially, I must come to the conclusion that the result is to make it commercially wholly unreasonable to carry on with the contract, and that the defendants are released from further performance.

The next question is as to damages. The defendants have paid £25 for this flight, or, at any rate, that sum forms part of the claim. Of course, not merely was it of no value to them, but it actually inflicted great loss upon them. I cannot see why their damages should not include the £25 which was thrown away. The next item is the money spent on advertising. It may seem a great deal now—I do not know that it does—but, if one tries to put oneself in the position in which the defendants were that day, it seems to me that it was a wholly reasonable thing that they should want to get their advertisements into the press as quickly as they could. Captain Michelmore recognised this himself, and so did the pilot, as is evident by the speed with which they wrote to the various newspapers. It is said that it might have been left to letters, which could have been published without any cost. They did not know that. Letters were published, and very freely, I know, but partly, at any rate, because money had been spent on advertising. I cannot say that that expenditure, in the circumstances, was unreasonable. I think that it was reasonable.

I come, then, to the claim for general damages, and here a point of law is raised. There is only a claim for general damages in respect of pecuniary loss, and Mr. Roskill says that I cannot give general damages for pecuniary loss in respect of breach of contract, and that I can give damages only by way of special damage for a breach of contract. For that argument Mr. Roskill relies upon *Groom* v. *Crocker* (1). I fail myself to see any difference in principle between a claim for special damage and a claim for general damage. One, of course, has to be proved as completely as does the other. The only difference is that, where one is claiming special damage, the circumstances are such that one is able to put one's finger on a particular item of loss and say, "I can prove that I lost so much there, so much there, and so much there," whereas a claim for general damage means this: "We cannot prove particular items, but we can prove beyond all possible doubt that there has been pecuniary loss." Once that has been proved, I cannot myself see any difference in principle between special damage and general damage. When one reads *Groom* v. *Crocker* (1), one sees that, so far from saying that there is any difficulty in recovering general damages, to my mind it says precisely the opposite. The relevant passage in the case is quite short. *Groom* v. *Crocker* (1) was decided so recently that I need not go through the facts. What Sir Wilfrid Greene, M.R., said (and this is what is relied upon) is at p. 401:

> It was said that, as the result of the negligence on the part of the appellants, the respondent was subjected to mental suffering, that he was held up to public disapproval, that his reputation as a careful driver was destroyed, and that the jury were entitled to award damages in respect of these matters. It was said that the action was an action in tort, and not in contract, and that, even if it were an action in contract, such damages were recoverable. In my opinion, the cause of action is in contract, and not in tort.

Sir Wilfrid Greene, M.R., then goes on to say what the duty was, and proceeds, at p. 402:

> No authority was cited to us which supports the proposition that, in an action based on breach of contract, damages can be recovered in respect of the matters to which I have referred [which did not include pecuniary loss]. No pecuniary loss arose from them, and no reasonable probability of pecuniary loss in the future could be shown.

Surely, if that means anything at all, it means that this is not a case of pecuniary loss, where, of course, damages could be given, but something quite different. Sir Wilfrid Greene, M.R., then says, at p. 402:

> Reliance was placed on *Wilson* v. *United Counties Bank, Ltd.* (2). In that case, bankers, who had been entrusted with the supervision of a trader's business, by their negligence caused his bankruptcy. In addition to damages for the loss occasioned to the bankrupt's estate, the jury awarded £7,500 damages for the injury to his credit and reputation, and it was held by the House of Lords that this award was good. The decision rested upon the special terms of the contract, under which the bank "agreed to take all reasonable steps to maintain the plaintiff's credit and reputation." Lord Birkenhead, L.C., put the case in the same class as that of the case where a banker dishonours a cheque although the customer's account is in funds. In such cases, it is the commercial credit of the customer that is injured, and the inference arises that pecuniary loss will necessarily ensue.

I repeat that I do not regard that as an authority for the proposition that general damages are not recoverable for pecuniary loss. Difficulty of proof does not dispense with necessity of proof. In considering damage on this part of the case, one has to be very careful that one is not giving damages for injury to reputation and that type of thing. One can only give general damages in respect of the pecuniary loss which has been sustained. A

The evidence as to that establishes beyond all question that there must be pecuniary loss, which is still going on. In the case before me, five or six retail greengrocers were called, and their evidence was all more or less to the same effect. One said :

> Whereas I used to sell very freely Batchelor's peas, after this customers would not touch them. B

Another one said that it used to be in the proportion of three to one in favour of Batchelor's peas, but that now it is the other way round, one in three. One shopkeeper said that he used to stock only Batchelor's peas, but that from that date he found that his customers refused to take C Batchelor's peas, and that he now has to stock other people's, and sells only a small quantity of Batchelors, as compared with what he sold before. There was evidence of that type from different places round about Manchester and Salford. I suppose that in this area there must be hundreds of greengrocers, and I have no doubt at all that the same D sort of thing is going on with them. The advertising put the matter right with a number of people, no doubt, but it has to be remembered that everyone does not read newspapers, and, as one letter written after the advertising showed, people do not always believe explanations. At any rate, there it is. There is no doubt, I repeat, that in a number of E small shops there were fewer Batchelor's peas being sold. The difficulty of putting a figure on that was that their sales depend so very much on the season. In a dry season, such as we have had recently, with no fresh vegetables coming along, of course, they do very well. As a matter of fact, their total sales throughout the country are bigger this year, F I gather, than they have ever been. They say, however, that that is due to this extraordinary season, and that they would have been very much greater in this area but for this trouble.

I can only do the best I can, being very careful not to put it too high, and particularly for the reason that, although I appreciate the difficulty, G I think that the defendants, if they had taken the trouble, could have given me more reliable figures. For instance, the manager talked about the difficulties that travellers had in making new connections, but no traveller was called to say, "AB refused to take our goods," or, "CD refused to order from us." I think, therefore, that they must H bear the responsibility for that. Taking it all in all, I think that, if I give £300 damages altogether, I am certainly not giving them too much. I am confident of that. However, I want to err very much on the low side, for fear it should be thought that I am doing what Sir Wilfrid Greene, M.R., said that I must not do—namely, give damages for loss of reputation. However, that £300 includes the advertising and the loss they have suffered. I repeat that I have not the least doubt it is too little, but I feel that they could have given me better evidence if they wanted a larger figure. I think that they could have called more evidence about it, and that is all that I feel I can award on an absolutely safe A basis.

I therefore make the declaration asked for, that the defendants are to be released from performance of the remainder of the contract.

I award judgment for the plaintiffs for £170 7*s.* 11*d.*, and make a declaration in favour of the defendants that they are no longer to carry B out the contract. There will be judgment for the defendants on the counterclaim for £300, with a mutual set-off.

Solicitors: *Torr & Co.*, agents for *Alex. Browne*, Grimsby (for the plaintiffs); *Ellis, Bickersteth, Aglionby & Hazel*, agents for *Claude Barker, Elliott & Co.*, Sheffield (for the defendants).

C [*Reported by* C. ST.J. NICHOLSON, ESQ., *and* M. D. CHORLTON, *Barristers-at-Law.*]

SECRETARY OF STATE *v.* BANK OF INDIA, LTD.

D [PRIVY COUNCIL (Lord Wright, Sir Shadi Lal and Sir George Rankin), **March 31, April 1, May 2, 1938.**]

Privy Council—India—Indemnity—Act done at request of another injuring third party—Government promissory note—Renewal—No express indemnity against claims under the note exacted by the government—Implied common law indemnity—Indian Securities Act, 1920, *ss.* 12, 13, 16, 21.

E

A broker, having possession of a government promissory note for Rs.5,000 of the 3½ per cent. loan of 1854-55 on behalf of a lady, who was the holder and indorsee, forged her indorsement to it in his favour and indorsed it for value to the respondent bank. The bank, acting in good faith, presented the note for renewal by the government under the Indian Securities Act, 1920, s. 12, and received a renewed note in F their favour. The lady, becoming aware of the fraud, and of the renewal of the note, sued the Secretary of State in conversion, and recovered the appropriate damages. The Secretary of State then instituted the present action against the bank, claiming to be indemnified against the loss thus sustained by him, on the principle that the renewed note had been issued at the request of the bank, and that he was accordingly G entitled to be indemnified against the damage resulting from the renewal. As far as the renewed note was concerned, it was accepted on both sides that it constituted a new contract between the government and the bank, unaffected by the circumstances in which it was issued. The government officer, when issuing the renewed note to the bank, did not exact an indemnity under sect. 21 of the Act. The Secretary of State contended that he was not debarred from relying on an indemnity H implied under the common law of India, which in this respect is identical with that of England:—

HELD: (i) the application to the prescribed officer for a renewed note, and the satisfying him of the justice of the claim, constitute a request from which a common law indemnity against injury to a third party may properly be *prima facie* implied, notwithstanding the fact that some deliberation may be involved on the part of the officer before he consents to renew the note.

(ii) sect. 21 provides an added statutory right of indemnity, different from, and in no way inconsistent with, the common law right, and therefore the Secretary of State was entitled to recover upon the common law indemnity.

[**EDITORIAL NOTE.** This case applies the principle that, when an act, which is not manifestly tortious, is done at the request of a third party, and such act turns out to be injurious to a third party, then there is implied at common law an indemnity to the party doing the act against all loss he may be liable to make good to the third party. In the present case there was also a statutory indemnity, but this is held to be additional to the common law indemnity, and therefore its existence did not prevent the Secretary of State relying upon the latter.

As to Indemnity, see HALSBURY, Hailsham Edn., Vol. 16, pp. 12, 13, para. 9; and for Cases, see DIGEST, Vol. 26, pp. 223-225, Nos. 1750-1765.]

Cases referred to:

(1) *Sheffield Corpn.* v. *Barclay*, [1905] A.C. 392; 26 Digest 228, *1782*; 74 L.J.K.B. 747; 93 L.T. 83.

(2) *Dugdale* v. *Lovering* (1875), L.R. 10 C.P. 196; 26 Digest 223, *1751*; 44 L.J.C.P. 197; 32 L.T. 155.

(3) *A.-G.* v. *Odell*, [1906] 2 Ch. 47; 38 Digest 756, *906*; 75 L.J.Ch. 425; 94 L.T. 659.

Appeal from a judgment and decree of the High Court of Judicature at Bombay in its Appellate Jurisdiction (Sir John W. F. Beaumont, C.J., and Rangnekar, J.), dated Sept. 10, 1936, affirming a judgment and decree of the said court in its Ordinary Original Civil Jurisdiction (Wadia, J.), dated Mar. 6, 1936. The facts of the case are set out in the judgment of their Lordships delivered by Lord Wright.

H. U. Willink, K.C., and *Sir Thomas Strangman, K.C.*, for the appellant.

Sir William Jowitt, K.C., and *C. P. Harvey* for the respondents.

Lord Wright: This is an appeal from a judgment of the High Court in appeal at Bombay, which affirmed a judgment of Wadia, J., as trial judge. These judgments rejected the claim of the appellant to be indemnified by the respondents against a liability which he had incurred and had been compelled to satisfy, in the circumstances of the case, which were shortly as follow. A lady named Gangabai was the indorsee and holder of a government promissory note for Rs.5,000. A broker named Acharya, having possession of the note on the lady's behalf, forged her indorsement to it in his favour, and indorsed it for value to the respondents. The respondents, acting in good faith, applied to the Government Securities Department under the Indian Securities Act, 1920, to have a renewed promissory note payable to them issued in exchange for the note which the respondents gave up in exchange. The lady, becoming aware of the fraud practised by Acharya, and the dealing with her note on the part of the respondents and the appellant, which constituted a conversion of her property by either or both as well as by Acharya, sued the appellant in conversion, and recovered the appropriate damages. The appellant then brought the present action against the respondents, claiming to be indemnified against the loss thus sustained by him, on the principle that the Securities Department had issued the renewed note at the request of the respondents, and was accordingly entitled to be indemnified against the damage resulting from the fact that what had been done involved an injury to a third party's rights. So far as the renewed note was concerned, it was rightly accepted on both sides before their Lordships that it constituted a new contract between the government and the respondents, which was not affected by the circumstances in which it was issued, and certain contentions raised in the courts below were abandoned by the appellant. Only questions of liability and of principle were argued before their Lordships, matters of amount being left for subsequent settlement if the necessity should arise.

It is convenient first of all to refer to the material sections of the Indian Securities Act, 1920, which, having replaced the repealed Act of 1886 dealing with the same matters, now regulates the legal position of these government promissory notes. Such notes were first issued in 1854, and circulate in large numbers in India. Hence the importance to the parties, and to the Indian public generally, of the question of principle involved in this appeal. It appears from the print of the note in question contained in the record that the note was originally issued in 1854 and payable to a named payee or order. The actual note in question was a renewal note which had been issued in Apr., 1925. On its back, spaces had been provided for 10 indorsements. The forged indorsement occupied the fifth space, and Acharya's indorsement to the respondents occupied the sixth space. At the foot of these spaces was a receipt signed by the respondents for a renewed note in lieu of the note. It is clear that the system of renewing notes is largely used in ordinary practice. It is obviously convenient to have a clean note, in addition to the circumstance that in the course of years the spaces available for indorsements become exhausted. Also, the holder of a renewed note obtains a new promise from the government free from any equities or disputes which might have attached to the prior note. Sect. 16 of the Act provides in terms that a renewed government promissory note is to be deemed to constitute a new contract between the government and the person to whom it is issued and all persons deriving title through him.

The Act contains express provisions for regulating the issue of renewed notes. In particular, sect. 12 provides that, subject to the provisions of sect. 13, a person claiming to be entitled to a government promissory note may, on applying to the prescribed officer, and on satisfying him of the justice of his claim, and delivering the promissory note receipted in the prescribed manner, and paying the prescribed fee, if any, obtain from such officer a renewed promissory note payable to him. Sect. 13 deals with a case where there is a dispute as to the title to one of these notes, and enables the officer to refuse to act save on a judicial decision or on the result of a formal inquiry. Sect. 21, on which the judgment under appeal was based, provides that, notwithstanding anything in certain specified sections, including sect. 12, the prescribed officer may in any case arising (i) issue a renewed security upon the applicant giving the prescribed indemnity against the claims of all persons claiming under the security so renewed, or (ii) refuse to issue a renewed security unless such indemnity is given. Rules have been made under the Act to "prescribe" the indemnity which may be exacted, which is to be a bond A of two substantial persons in double the face amount of the note.

In the present case, the government officer, when issuing the renewed note to the respondents, did not exact a security under sect. 21. The question is whether or not the appellant is debarred from relying on an indemnity implied under the common law of India, which in this respect B is identical with that of England. The principle under which such an indemnity is implied is stated by the EARL OF HALSBURY, L.C., in *Sheffield Corpn.* v. *Barclay* (1), to be correctly expressed in a quotation from counsel's argument in *Dugdale* v. *Lovering* (2), at p. 197 :

> It is a general principle of law when an act is done by one person at the request C of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.

This principle, which in England must now be read in connection with recent legislation as to contribution between tortfeasors, is of the widest D general application. It is often, as in the statement by LORD DAVEY in the same case, to which reference will shortly be made, said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. However, in the words adopted by the EARL OF HALSBURY, L.C., E it is said merely that the person is entitled to an indemnity. The fiction of a contract implied by law adds nothing, though it may seem to justify the court in holding as a matter of law that the party is entitled to the indemnity on the basis that the assertion by the applicant of his request is the offer of a promise to indemnify if the other party acts upon that F request to his damage. Sir William Jowitt has contended that the necessary elements are the assertion and the action taken upon that assertion by the other party. He has contended that neither element is present in the case of the performance of a statutory duty like that in question. There was, he says, no assertion by the respondents, but only G a claim, in respect of which the government official had to act on his own responsibility and judgment. His conduct, it is said, was not ministerial, but judicial, or semi-judicial, since the statute by sect. 21 gave him the right to refuse the renewed note except on the terms of his being granted the prescribed indemnity. Reliance was particularly placed on H the form in which the rule was stated by LORD DAVEY in *Sheffield Corpn.* v. *Barclay* (1), where LORD DAVEY thus stated the principle, at p. 399 :

> I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which

> word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it.

A It seems that it was on this line of reasoning that WADIA, J., decided in favour of the respondents. BEAUMONT, C.J. (with whose judgment RANGNEKAR, J., agreed) was not prepared to accept this reasoning, but preferred to rest his decision upon a different ground, which will be explained later in this judgment. Their Lordships are, with respect, B unable to agree with WADIA, J. LORD DAVEY, in their opinion, did not mean, when he used the word "ministerial," to indicate that the act done must be done without any element of choice, deliberation or decision on the part of the doer. All, it seems, that he meant was that the official had no interest except to perform his statutory duty. Never- C theless, the mere performance of that duty may involve some degree of deliberation and judgment. Thus, in the *Sheffield* case (1), which dealt with the requesting of transfers of stock in the corporation's register, the indemnity was implied though the Sheffield Corporation Act, 1883, s. 30 (1), provided that:

D

> the corporation or the registrar before allowing any transfer of stock may, if the circumstances of the case appear to them or him to make it expedient, require evidence of the title of any person claiming a right to make the transfer.

Similarly, in *A.-G.* v. *Odell* (3), the Court of Appeal were, it seems, prepared to hold that a person who, acting in good faith, brought to the E Land Registry a transfer apparently executed by the registered proprietor of the piece of land, but in fact a forgery, became subject to a contract implied by law to indemnify the person whose duty under the Land Transfer Acts was to register transfers, against any liability resulting from the exercise of the duty. There may indeed be cases where the F person charged with the statutory duty is also charged with the responsibility of deciding in a judicial or quasi-judicial capacity whether or not it is proper to exercise the duty in any particular case, so that he could not be regarded as acting on the applicant's request, but solely on his own statutory responsibility. Such cases which are contemplated as possible G in *A.-G.* v. *Odell* (3) would depend on the particular construction of the particular statutes, but would involve considerations which are different from those presented in *Sheffield Corpn.* v. *Barclay* (1), or *A.-G.* v. *Odell* (3). It is on the analogy of these latter authorities that, in their Lordships' judgment, the present case must be determined. There is nothing H anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant. Indeed, in the simpler type of case illustrated by *Dugdale* v. *Lovering* (2), it is not necessary that the plaintiff should have been other than a free agent. He may act on the defendant's request, not under compulsion, but of choice. That does not, however, deprive him of the right, if the circumstances are appropriate, to the implied indemnity, though no doubt he may waive the right. Similarly, where the duty is statutory and must be performed if the statutory conditions are fulfilled, the fact that the official may have to see that these conditions are fulfilled does not *per se* debar him from saying that he has acted upon the assertion or A claim or request of the applicant. In this connection, BEAUMONT, C.J., says:

> If he [the prescribed officer] acts upon the request, I doubt if it is relevant to say that he has also considered the matter for himself.

B

Their Lordships agree in this with BEAUMONT, C.J., except that they do not *prima facie* regard it as a matter of doubt.

This view is fortified by considering the language of sect. 12, which clearly puts the onus on the applicant:

> A person claiming to be entitled to a government promissory note may [that is, is entitled] on applying to the prescribed officer and on satisfying him of the justice of the claim and delivering the promissory note receipted in the prescribed manner and paying the prescribed fee, if any [obtain the renewed note]. C

"Claiming" involves an assertion of title. The act of applying is the applicant's act. "Satisfying" is, as Mr. Willink pointed out, in the active, not the passive, and is a condition to be fulfilled by the applicant. These D matters clearly, in their Lordships' judgment, constitute a request, from which the common law indemnity may properly be *prima facie* implied, none the less because some deliberation may be involved on the part of the officer before he submits to be satisfied by what the applicant puts before him. E

Nevertheless, BEAUMONT, C.J., held that the common law indemnity could not be implied under this Act because of sect. 21, which, in his judgment, excludes any implied indemnity, because it gives a right to demand an express indemnity and to refuse to give the renewed note unless an express indemnity is given. He thought that the express provision by sect. 21 F of the statutory right was inconsistent with the existence of an implied right if the section was not acted upon. He concluded that the legislature must be deemed to have intended that there should not be a right of indemnity in every case, but only under the special conditions of sect. 21. Their Lordships are, with respect, unable to accept this view. As a G matter of construction, they do not accept the view that sect. 21 has not merely the positive effect of giving the special right which it provides for, but also the negative effect of cutting out the implied right of indemnity undoubtedly, in their judgment, existing under the Act of 1886, which embodied the law on this matter until it was repealed and replaced H by the Act of 1920. A statute is *prima facie* to be construed as changing the law to no greater extent than its words or necessary intendment require. Sect. 21 was not in the Act of 1886. If it had been intended by the insertion of that section in the Act of 1920 to abrogate the common law indemnity existing under the repealed Act, the legislature would have used words clearly expressing that intention, so as to secure that, save as provided by sect. 21, there should be no right of indemnity. Their Lordships see no reason to justify reading in or implying such words. On the contrary, they construe sect. 21 as giving an added statutory right, which is different from, and in no way inconsistent with, the common law right. That latter right is not complete merely because the officer has acted upon the request. To make it effective, it is necessary that a further condition should be fulfilled—namely, that, in the words used in *Dugdale* v. *Lovering* (2), " the act should turn out to be injurious to the rights of a third party." Thus the common law right is required in a case where the officer, though satisfied by the applicant when he issues the renewed note of the justice of his claim, is wrongly satisfied. Though both he and the applicant were acting in perfect good faith, and without suspicion, they may be, as they were in this case, unconsciously infringing the rights of the true owner of the note, and guilty of converting it. Cases in which the common law implies the indemnity are generally cases when the officer would not have thought of demanding an indemnity under sect. 21. These are mostly, if not always, cases where the risk is due to the fraud of some other person. Sect. 21, if construed as it is by BEAUMONT, C.J., would put the burden of this risk on the government, unless in every case the officer exacted the statutory indemnity under sect. 21. This, however, would place a serious and unnecessary burden on the course of renewing these notes, which is a practice in constant use, and one to be facilitated, not obstructed. On the construction which their Lordships think is, merely as a matter of construction, correct, the common law indemnity would be operative in the cases, presumably rare on the average, where it turns out eventually to be wanted because of some concealed fraud. On the other hand, the officer would generally exercise the right to require the express indemnity before issuing the renewed note, wherever he can say that he is satisfied, but still he is conscious that there are circumstances of doubt or otherwise which lead him to refuse to issue the renewed note without the express indemnity. It may be noted that, under sect. 21, what can be demanded as a condition of issuing the renewed note is the " prescribed " indemnity, which, under the rules prescribed under the statute, is to be the bond of two substantial persons for twice the amount of the note. This is obviously different from the common law indemnity. It may further be observed that, if the matter were to be decided on the basis of the equities between the parties, the loss would more properly, it seems, be borne by the respondents, who have thought fit, in the course of their business which they carry on for profit, to purchase the note from Acharya on the forged indorsement, and have assumed the responsibility of putting forward the note as being their own property, whereas the government officer has merely performed his statutory duty in a ministerial capacity on the claim and assertion of the respondents. There is, in their Lordships' judgment, every reason why the court should imply an indemnity in this case, and no sufficient reason why they should treat sect. 21 as excluding that implication. It is no doubt true that, if an express indemnity were exacted under sect. 21, it would exclude any implied or tacit indemnity. However, that is a different matter from construing sect. 21 as removing from the scope of the statute the possibility, in a proper case, of the implied indemnity where no express indemnity has been required.

For all these reasons, their Lordships are of opinion that the appeal should succeed, that the judgments of the courts below should be set aside, and that it should be adjudged that the appellant recover from the respondents the proper amount under his claim, and should also have the costs of this appeal, and his costs in the court below. If the parties can agree what is the proper amount, it can be inserted in the order in council. If they cannot agree, the case must be remitted to the High Court at Bombay to assess the amount. They will humbly so advise His Majesty.

Solicitors: *The Solicitor, India Office* (for the appellant); *E. F. Turner & Sons* (for the respondents).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

Re HARWARD, NEWTON *v.* BANKES.

[Chancery Division (Simonds, J.), **March 29, 30, 1938.]**

Will—Life estate followed by gift in remainder—Death of tenant for life in testator's lifetime—Whether gift lapsed.

A testatrix by her will gave to her daughter the sum of £5,000 absolutely, then by a codicil directed that her trustees should hold this sum upon trust to invest it and to pay the income from the investments to her daughter for life and after her death to hold the trust fund upon trust for the testatrix's statutory next of kin. The daughter died after the execution of the codicil but before the testatrix, and it was contended that there had been a lapse of the legacy to her:—

Held: the legacy by the effect of the codicil became a settled legacy, and did not lapse by reason of the death of the daughter in the testatrix's lifetime. It should be held upon the trusts declared in the codicil.

[**EDITORIAL NOTE.** The difficulty that was felt in this case arose from the unusual terms of the gift which were to take effect upon the death of the daughter. It is decided that, reading the will and codicil as a whole, the effect of the gift in the codicil is to create a settled legacy. Once this conclusion is reached, the matter is clearly covered by authority, and there can be no lapse.

As to Lapse of Settled Shares, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 612, 613, paras. 1199, 1200; and for Cases, see DIGEST, Vol. 44, pp. 506, 507, Nos. 3249-3256.]

Cases referred to:

(1) *Re Powell, Campbell* v. *Campbell*, [1900] 2 Ch. 525; 44 Digest 506, *3251*; 69 L.J.Ch. 788; 83 L.T. 24.

(2) *Re Roberts, Tarleton* v. *Bruton* (1885), 30 Ch.D. 234; 44 Digest 507, *3256*; 53 L.T. 432.

(3) *Re Taylor, Taylor* v. *Taylor*, [1931] 2 Ch. 237; Digest Supp.; 100 L.J.Ch. 309; 145 L.T. 443.

(4) *Re Pinhorne, Moreton* v. *Hughes*, [1894] 2 Ch. 276; 44 Digest 506, *3250*; 63 L.J.Ch. 607; 70 L.T. 901.

(5) *Re Walter, Turner* v. *Walter* (*No. 2*) (1912), 56 Sol.Jo. 632; 44 Digest 506, *3253*.

(6) *Re Whitmore, Walters* v. *Harrison*, [1902] 2 Ch. 66; 44 Digest 506, *3252*; 71 L.J.Ch. 673; 87 L.T. 210.

Originating Summons by which the plaintiff, the sole executor and trustee of the will of Mrs. Elizabeth Ann Harward, asked the court to determine whether a legacy of £5,000 bequeathed by the will of the testatrix to her daughter Gwendoline Ida Huggins lapsed by reason of the daughter's death in the lifetime of the testatrix or whether notwithstanding her death the same is held upon the trusts declared concerning the same in a codicil to the will. The material parts of the will and of the codicil are set out in the judgment.

A. P. Vanneck for the plaintiff.

E. M. Winterbotham for the first defendant, a legatee, and also claiming under an intestacy.

C. L. Fawell for the second defendant, a residuary legatee, claiming that there was no intestacy.

Winterbotham: There is no lapse here. What the testatrix has done is to give a sum of £5,000 out of the residuary estate, and she has directed her trustees to stand possessed thereof and to pay the income to her daughter for life, and after her death for a class of next of kin. If that be the right way to construe the will, there cannot be a lapse. There is a settled sum given out of residue, and the death of the tenant for life cannot cause a lapse. In a particular will, it may be that nothing is given to the remaindermen unless a particular person survives the testator. In the present case, there is a settlement of a specific sum of £5,000 given by the will. There is no contingency expressed. [Counsel referred to *Re Walter, Turner* v. *Walter* (*No. 2*) (5) and *Re Whitmore, Walters* v. *Harrison* (6).]

Fawell: If the trusts are so interlocked that one cannot separate them, one is entitled to say that, if the legatee dies, there is not a lapse; but where, as in the present case, the super-added trust becomes impossible, then, on principle and on the authorities, the effect is that the trust has failed. No case has gone so far as to hold that a legacy persists after the legatee has died. [Counsel referred to *Re Roberts, Tarleton* v. *Bruton* (2), *Re Taylor, Taylor* v. *Taylor* (3), *Re Powell, Campbell* v. *Campbell* (1), *Re Pinhorne, Moreton* v. *Hughes* (4).]

Simonds, J.: The testatrix in this case made her will on Dec. 23, 1932, and thereby directed her trustees to stand possessed of her residuary trust funds as to £5,000 for her sister Eliza Eales Bankes absolutely, and as to a further sum of £5,000 for her sister Jane Stevenson Macey absolutely, and as to a further sum of £5,000 for her daughter Gwendoline absolutely, and as to the remainder of the residue for various legatees in equal shares. The question before me arises on the gift of £5,000 to the daughter Gwendoline. Having made that disposition by her will, the testatrix made a codicil on Oct. 23, 1933, of which the material part is in these terms:

> So far as the legacy of £5,000 part of my residuary trust fund bequeathed by my will to my daughter Gwendoline Ida Huggins absolutely is concerned I direct that my trustees shall stand possessed thereof upon trust to invest the same in their names or under their control in or upon any investments for the time being authorised by law for the investment of trust funds with power for my trustees at their discretion to change such investments for others of a like nature and to stand possessed of the investments hereby directed to be made and the investments for the time being representing the same (hereinafter called "the daughter's trust fund") upon the trusts following that is to say upon trust to pay the income thereof to the said Gwendoline Ida Huggins during her life without power of anticipation either during any coverture or during her widowhood and after her death I direct that the capital and income of the daughter's trust fund shall be held in trust for the persons who would on the death of my daughter as my statutory next of kin under the Administration of Estates Act, 1925, have become entitled thereto as if I had died possessed thereof intestate and without ever having been married such persons to take as tenants in common in the same shares in which they would have taken under that Act.

The testatrix died on Jan. 3, 1937, but on July 23, 1934—that is, between the date of the first codicil and the date of the death of the testatrix—her daughter Gwendoline died. The question now arises whether that gift of £5,000 takes effect so far as the reversionary legatees named in the codicil are concerned, or whether the legacy has lapsed. I must say exactly what Cozens-Hardy, J., said in *Re Powell, Campbell* v. *Campbell* (1). Reading this will, apart from all authority, I think that it is pretty plain that the testatrix intended that her daughter should take a life interest only in the sum of £5,000. That is, I think, the plain meaning to be derived from a consideration of the will and codicil of the testatrix. Is there anything, then, in the authorities which precludes me from coming to that conclusion? Authorities are useful only in so far as they lay down some canon or principle of construction. If there is a canon or principle of construction which governs the interpretation of this will, I must follow it. The only rule of construction is that I must look at all the words of the will and codicil and give them their proper effect, so as to arrive, from the consideration of them all, at the intention of the testatrix. Having done that, I come to the same conclusion. The words, properly construed, have this meaning, and this meaning only—namely, that the testatrix intended the sum of £5,000 to be enjoyed by her daughter Gwendoline for her life, and, after her death, by others in equal shares. This is not a case in which the testatrix has made a gift to persons in succession of something which is described as a sum of money or a share to which the tenant for life will become entitled. It is a gift of a sum of £5,000, which in the codicil is identified by reference to a gift in the will. The testatrix, knowing that she has given £5,000 absolutely to her daughter, Gwendoline, and wishing to settle that sum on Gwendoline for life, and on others after her death, has in the codicil identified it by apt words. She has described it as the £5,000 which she has given to her daughter Gwendoline absolutely, and then has directed that that sum shall be held by her trustees for certain persons in succession. It seems to me that, as soon as one comes to that conclusion, such cases as *Re Roberts*, *Tarleton* v. *Bruton* (2) and the recent case of *Re Taylor*, *Taylor* v. *Taylor* (3) before EVE, J., clearly have no reference to the words which I have to construe. They fall within what was said in the case before COZENS-HARDY, J., in *Re Powell*, *Campbell* v. *Campbell* (1), and in the case of *Re Pinhorne*, *Moreton* v. *Hughes* (4) before CHITTY, J. In *Re Powell*, *Campbell* v. *Campbell* (1), COZENS-HARDY, J., said, at pp. 528-529:

> Reading this will apart from authority, I think it is pretty plain that the testatrix intended that each of her daughters should take a life interest, and a life interest only, in one-third of this residuary estate . . . I think the testatrix has expressed her intentions quite clearly, and has made a good disposition of a life interest to each daughter, a life interest to each husband, with remainder to their respective children in the usual way, with an accruer in default of any child of a daughter to take a vested interest. If that be the true construction of this will, the death of one of the daughters in the lifetime of the mother has no other effect than to accelerate the life interest of the surviving husband . . . As far as the authorities go, I am therefore at liberty to come to the conclusion that the share of this deceased daughter has not lapsed, but was duly settled.

In *Re Pinhorne*, *Moreton* v. *Hughes* (4), CHITTY, J., said at p. 279:

> I see no difficulty in interpreting, in strict accordance with the language of the testator, the words "the share of each of my sisters." The fourth share means, that which I have just now apparently given her, but which I show by my will I do not intend for her except in the way hereinafter mentioned—that is to say, it is a fourth share, to be settled upon her in such a manner that she takes a life interest only in it. The result then is, in my opinion, that the death of Eveline in the testator's lifetime has not displaced the settlement. Of course the testator anticipated, as testators always do, that the object of his bounty would survive. But in effect he has given her a life interest; that has come to an end by her death, and by her death no doubt in his lifetime. I think the settlement is well effected and stands.

It is true, and I have not neglected to give appropriate weight to it, that the result is somewhat whimsical, in that the testatrix had contemplated that, after the death of the life tenant, the reversionary interest should be taken by the persons who, on the death of her daughter Gwendoline, would have become entitled thereto. That is a factor which has been referred to in other cases as indicating that the condition of the gift is that the tenant for life would survive the testatrix. It is a factor, and has to be taken into account, but it is not conclusive, for a testator assumes that the objects of the gift will survive him. It amounts to no more than this—namely, that the testatrix has made a most whimsical disposition.

Declaration against lapse by reason of the death of Gwendoline in the lifetime of the testatrix. The legacy to be held upon the trusts declared in cl. 3 of the codicil. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *Nash, Field & Co.* (for the plaintiff); *B. A. Woolf & Co.* (for the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

LEVER BROTHERS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), **May 18, 1938.**]

Revenue—Stamp duty—Transfer of shares—Acquisition of not less than 90 *per cent. of issued share capital—Part of* 90 *per cent. of issued share capital previously acquired for cash—Finance Act,* 1927 (*c.* 10), *s.* 55.

The appellant company in 1919 acquired all the issued ordinary shares of the C. Co. for a cash consideration. In 1936, it acquired practically all the issued preference shares, in consideration of the allotment of preference shares of the appellant company. It was contended that the transfers effecting the acquisition of the preference shares in 1936 were exempt from stamp duty under the Finance Act, 1927, s. 55 :—

Held : the consideration for the acquisition of the ordinary shares was cash, and not the allotment of shares, and it could not be said that the appellant company had increased its capital with a view to the acquisition of 90 per cent. of the share capital of the C. Co. The transfers were not entitled to the exemption claimed, and attracted the usual *ad valorem* conveyance duty.

Decision of Lawrence, J., ([1937] 4 All E.R. 227) *affirmed.*

[**EDITORIAL NOTE.** This case severely limits the operation of the exemption in the Finance Act, 1927, s. 55. The decision might have been, as it was in the court below, limited to the question of the earlier acquisition being for cash ; but the case now lends support to the view of the commissioners that there must be an acquisition by the operation of one and the same scheme of not less than 90 per cent. of the shares in consideration only of the allotment of shares in the acquiring company, and the occasion must be a reconstruction or an amalgamation of companies.

As to Relief from Stamp Duty on Transfers of Shares, see HALSBURY, Hailsham Edn., Vol. 5, pp. 809-813, paras. 1386, 1387 ; and for Cases, see DIGEST, Supp., Companies, Nos. 7155a, 7155b. For the section see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 16, pp. 983–986.]

Appeal from an order of Lawrence, J., dated Oct. 29, 1937, and reported in [1937] 4 All E.R. 227. The facts are fully stated in the judgment of Sir Wilfrid Greene, M.R.

Sir William Jowitt, K.C., and *James Wylie* for the appellants.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *J. H. Stamp* for the respondents.

Sir Wilfrid Greene, M.R. : The appellants, Lever Brothers, Ltd., in 1919 acquired the whole of the issued ordinary share capital of a company called the New Transvaal Chemical Co., Ltd. That company had issued a number of preference shares, falling into two classes, and, at the date which is relevant for the purposes of this appeal—namely, Apr. 23, 1936—the Chemical Co.'s issued share capital consisted of 250,000 ordinary shares of £1 each, the whole of which belonged to the appellants, 200,000 6 per cent. first preference shares of £1 each, fully paid, and 150,000 8 per cent. " A " preference shares of £1 each, fully paid. The appellants were minded to acquire the preference capital of the Chemical Co., and accordingly, on Apr. 23, 1936, they issued a

circular, in a form which is familiar, to the holders of preference shares in the Chemical Co., inviting them to exchange their shares, on a basis there laid down, for shares in the appellant company, which would be issued in exchange. The result of that offer was that a very large percentage of the preference shareholders agreed, and a very large percentage
A of the shares fell to be acquired by the appellants. By their holding of the ordinary shares which they had already, and the preference shares which they were thus acquiring, they would hold more than 90 per cent. of the issued share capital of the Chemical Co. I think that the ordinary share capital which they already held represented 42 per cent.
B of the issued share capital of the Chemical Co.

In those circumstances, the appellants claimed to be entitled to the exemption which is granted by the Finance Act, 1927, s. 55, in respect of the stamp duty payable on the transfer to them of the preference shares in the Chemical Co. which they had so acquired. The com-
C missioners of inland revenue refused to admit that claim, and, upon a case stated by them, LAWRENCE, J., upheld their decision, and this appeal results.

The Finance Act, 1927, s. 55, provides relief, in the case of reconstructions or amalgamations, against two classes of duty—namely, capital
D duty and transfer duty. It contemplates two common methods of amalgamation, or what is commonly called amalgamation: (i) the method where one company acquires the undertaking or part of the undertaking of another company, and (ii) where a company acquires the shares of another company without acquiring its assets. The section
E in the latter class of case requires that the acquisition shall be an acquisition of not less than 90 per cent. of the issued share capital of the company which it is desired to take over. The object of fixing a limit like that is obvious. First of all, if the limit had been fixed at 100 per cent., in practice the exemption granted by the section would probably have
F been effective in very few cases, because, in amalgamations of that kind, in practice, it has always proved impossible to get the full 100 per cent. of the shares. On the other hand, the legislature desired to keep this relief limited to the case where there was, in every business sense, a real amalgamation, and, therefore, it fixed 90 per cent., which, for all practical
G purposes, is a total acquisition. It did not allow the exemption in cases where less than 90 per cent. of the shares were being acquired. There is another condition in the section—namely, that, where the amalgamation takes place by the issue of shares to the existing holders of shares in the existing company in exchange for their shares, 90 per cent. of the
H consideration shall be issued to those holders. The object of that is to confine the relief to cases where the shareholders are remaining substantially the same.

The question which arises in the present case is this. The appellants did not, by virtue of a scheme, acquire 90 per cent. or more of the share capital of the Chemical Co. They had already acquired 42 per cent. by a cash purchase years ago, and the present scheme, therefore, was a scheme for the acquisition of the remaining 58 per cent. They say that, in acquiring that 58 per cent., they are making up their present holding to the 90 per cent. to which the section refers, and that that is sufficient to bring this acquisition of 58 per cent. within the benefit of the section.

The section starts off with the fundamental and basic condition upon which its provisions are to operate. I do not propose to read it at length. It is a long section, but it starts off by requiring that certain conditions shall exist in connection with a scheme for the reconstruction of any company or companies, or the amalgamation of any companies. There must, therefore, be a scheme for the amalgamation of companies, and it is in connection with such a scheme that the conditions stated are to exist. When it is shown that those conditions exist in connection with such a scheme, the relief is to follow. The provisions relevant to the present case are that the acquiring company (which in the section is called the transferee company, and which in the present case is the appellant company) must have either increased its capital or issued unissued capital (which is what the appellants here did) with a view to the acquisition of not less than 90 per cent. of the issued share capital of, in the present case, the Chemical Co. The point arises on that phrase, and the contending arguments are in substance these. The Crown says that that particular condition relates to the case where, under an amalgamation scheme, there is an intention to acquire under that scheme, and not by any other scheme, not less than 90 per cent. of the issued share capital. The appellants, on the other hand, say that the words are satisfied in a case where the acquiring company, already holding a certain percentage, forms a scheme with a view to the acquisition of as many additional shares as, together with its existing holding, will bring its holding up to at least 90 per cent.

In my opinion, the Crown's contention is correct. First of all, it is in accordance with the literal meaning of the words. There must (in regard to the facts of this case) be an amalgamation scheme in connection with which there is an issue of unissued capital with a view to the acquisition of not less than 90 per cent. of the issued share capital of the Chemical Co. It seems to me that, on the literal meaning of the phrase, that condition has not been fulfilled in the present case. The issue of unissued share capital which has taken place was made with a view to the acquisition of 58 per cent. of the issued share capital. It was not made with a view to the acquisition of 90 per cent. Thus, on the mere verbal, literal meaning of the words, the Crown's contention accords with the language used.

On the other hand, the contention of the appellants involves writing into this language qualifying words, and extending the phrase which has been used to cover the case, not merely of an acquisition of at least 90 per cent., but of the acquisition of a balance necessary to make, with an existing holding, 90 per cent. That is not what the language means. I will not say that the language would not be susceptible of such a meaning were the whole context of the section to compel the mind to attribute that meaning to it. I am merely taking the language and saying that, by itself, without a context, it does not appear to me to A be susceptible of the meaning which the appellants attach to it.

The next consideration which appears to me strongly to support the Crown's view is this. It is provided in sect. 55 (1) (*c*) that one of the conditions is to be that the consideration for the acquisition of the shares in the Chemical Co. is to consist, as to not less than 90 per cent., of the B issue of shares. In other words, the only type of transaction which the section is assisting is a transaction upon a share basis. It affords no assistance in the case where the acquiring company acquires shares for cash. The words "the acquisition" appear in both the conditions, both the one with which I dealt a moment ago, which uses the phrase "with C a view to the acquisition of not less than 90 per cent.," and the condition which provides that the consideration is to be a share consideration. The result of that appears to me to be that, if, in the former of those two conditions, the word "acquisition" means "acquisition of 90 per cent.," the whole thing hangs together. If, however, it means acquisi- D tion in the sense of bringing the existing holding up to 90 per cent., it would be impossible to say of the appellants in the present case that they had acquired their 90 per cent. for a share consideration, because, upon the facts of this case, 42 per cent. was acquired for cash.

There is one other provision in the section which appears to me to E point strongly in the same direction. Under sect. 55 (6), provisions are put in for what I may, for the sake of brevity, call ensuring some degree of permanence in the amalgamation which is to be carried through. Obviously, the legislature would not be willing to grant exemption from stamp duties unless it were in connection with something which was not F merely in form an amalgamation, but an amalgamation to which an end was not going to be put within a few weeks, or something of that kind, by disposing of the shares which had been acquired. It would have been a curious result if the benefit of a provision which was obviously enacted in order to encourage, or, at any rate, to prevent discouragement G of, amalgamation could be obtained without ensuring that there should be an effective amalgamation with, at any rate, some degree of permanence in it. With a view to that, subsect. (6) provides, among other matters, that, where the acquiring company has acquired shares in the other company (if it is that type of amalgamation), if the shares are H sold, or if any of the shares are sold, or got rid of, within two years, then the benefit of the exemption which has been granted shall be taken back, and the duty must be paid.

The result of the argument put forward on behalf of the appellant company would be a curious one. If it had not held the ordinary shares, and had by one scheme set out to acquire 90 per cent., thus bringing

itself within the section, and had acquired the 90 per cent. in considera-
tion of an issue of its own shares, it would have been bound to hold the
shares so acquired for two years, under the penalty of losing the exemption
which had already been granted to it. If the appellant company is
right here, it could to-morrow change its mind, and decide to sell the
ordinary shares, because those ordinary shares are not the shares acquired A
under the scheme. The result of that would be that, at any rate, the
limited period of permanence for amalgamations upon which the section
is insisting would not be achieved in a case such as the present. It does
seem to me that that provision of subsect. (6) points very strongly to
the view that this section is dealing, and is dealing only, in the matter B
of amalgamations by the acquisition of shares, with the simple case of
an acquisition of 90 per cent. or more. It is not concerning itself with
cases as to which one can quite well see that different questions of policy
might very easily arise, because, if the appellants are right, a company
which already holds 80 per cent. of the shares could acquire the remain- C
ing 10 per cent., and then say: "This is an amalgamation scheme."
Obviously, if it could not be said that such a thing was an amalgamation
scheme, it could not fall within the section. If, however, the acquisition
of an outstanding 10 per cent. is not an amalgamation scheme, why is
the acquisition of an outstanding 58 per cent. an amalgamation scheme? D
Moreover, if it is, where is the line to be drawn between those two
extremes? One would, or one might, get into all sorts of difficulties
about questions of degree. As I read this section, the legislature has
picked out a simple and typical case of frequent occurrence in practice,
and has used language appropriate to giving relief in that case, and in E
no other case. In my judgment, it would be contrary to all principles
of construction to force the language used so as to bring the present case
within it, because it has some apparent attractiveness from the point
of view of abstract justice in it. This section is not concerned with
such matters. It gives a limited kind of relief in limited circumstances, F
and the taxpayer must bring himself within the language if he is to get
that relief. In my judgment, the appellant company entirely fails to
do so.

I should mention one further argument which was raised on subsect. (7).
It was said that, under subsect. (7), which I need not read, an acquiring G
company, which had originally set out with a scheme to acquire less than
90 per cent., could get the benefit of the section if it afterwards decided
that it would get the remaining amount necessary to bring it up to
90 per cent., and that in that case it would get the benefit of the exemption
provisions if it got in the remainder within six months. It is said that H
it would be a curious result if a company which, so to speak, acquired
90 per cent. in two bites, under what really would be two schemes, should
get the exemption, whereas a company such as the present should not.
That argument, in my judgment, is based on a misconstruction of the
section, because the section does not contemplate anything of that sort.

The object of the section, I venture to think, is quite clear. It covers the case where there was, to begin with, a scheme (which is referred to as "the scheme") for the acquisition of 90 per cent. That scheme was one which ultimately must be carried out. In other words, the 90 per cent. must be acquired under that scheme, but the subsection is designed to meet the case where the necessary 90 per cent. has not been acquired in time to enable the exemption to be granted. One might get a case where, to begin with, they got in only 50 per cent., and then, after a good many months, perhaps by persuasion, or something of that kind, they succeeded in getting enough to make it up to the 90 per cent. It must always be one scheme, and, in that case, when they come to lodge the first set of transfers, to have the stamp duty adjudicated upon them, they will not be able to point to a scheme that was 90 per cent. effective, and therefore they will not get the advantage of the section. This subsection provides that in such a case, if they can show that the scheme has been completed within the stated period, then they shall get, not merely the exemption for the balance, but repayment of the duty paid on the transfers which had been brought in and stamped in the early days of the history of the scheme. In my opinion, the case is a clear one, and the appeal must be dismissed with costs.

SCOTT, L.J.: I agree.

CLAUSON, L.J.: I agree.

Appeal dismissed with costs. Leave to appeal.

Solicitors: *J. M. B. Stubbs* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

LEWIS *v.* DENYÉ.

[LIVERPOOL SPRING ASSIZES (Tucker, J.), **April 13, 14, 1938.**]

Factories—Dangerous machinery—Failure to fence—Contributory negligence—Failure of boy to use push-stick in accordance with statutory regulations—Boy ignorant of regulations—Factory and Workshop Act, 1901 (*c.* 22), *ss.* 10, 79—*Woodworking Machinery, Use of, Regulations,* 1922 (*S. R. & O.* 1922, *No.* 1196), *regs.* 11, 23 (ii).

The plaintiff, who was 16½ years of age, met with an accident while employed on a circular wood-cutting machine in the defendant's factory, where he had been so employed, on and off, for some 17 months. At the time of the accident, he was engaged in cutting timber measuring from 3 ins. to 2 ins. in depth, and, before he commenced work, the foreman, in accordance with the practice at the factory, adjusted the guard fitted to the saw in the proper position for cutting timber this size, so that the teeth of the saw were covered by the guard, except at the point where the lengths of timber were inserted, where the teeth were of necessity exposed for a few inches. The plaintiff was supplied with a push-stick for the purpose of pushing through the length of sized timber, and also for that of detaching the off-cut from the left-hand side of the saw. After inserting a piece of timber, and while detaching the off-cut, the thumb of the plaintiff's left hand got caught in the saw at the point of entrance, with the result that his thumb was cut off at the top joint, and that he eventually lost his little finger and the tops of his ring and middle fingers. The accident was caused through the plaintiff detaching the off-cut with his left hand instead of using the push-stick. The Factory and Workshop Act, 1901, s. 10, provides that all dangerous parts of machinery shall be either securely fenced, or be in such a position as to be equally safe to every person working in the factory as they would have been if securely fenced. Reg. 11 of the regulations made under sect. 79 of the Act requires a suitable push-stick to be kept available for use at the bench of every circular saw fed by hand, and reg. 23 (ii) requires every person employed at the machine to use the push-stick provided in compliance with reg. 11 :—

Held : (i) the defendant had committed a breach of his statutory duty under the Factory and Workshop Act, 1901, s. 10, in failing to guard the teeth at the point of entrance to the saw, and the duty under that section was not altered by the regulations made under sect. 79.

(ii) the plaintiff had been guilty of contributory negligence in not complying with his statutory duty under reg. 23 (ii), and the defendant must succeed on this ground.

[EDITORIAL NOTE. In *Murray* v. *Schwachman, Ltd.* (1), the Court of Appeal based their decision upon the regulations there in question, and left open the question how far, if at all, the absolute duty imposed by the Factory and Workshop Act, 1901, s. 10, is, or can be, varied by regulations made under other sections of the Act. It is here decided that the duty imposed by sect. 10 is independent of the regulations made under sect. 79, and therefore creates an absolute duty to fence ; but this does not prevent a defence of contributory negligence on the part of the workman.

As to Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-596, paras. 130-133 ; and for Cases, see DIGEST, Vol. 24, pp. 908-912, Nos. 62-84.]

Case referred to :

(1) *Murray* v. *Schwachman, Ltd.*, [1938] 1 K.B. 130 ; [1937] 2 All E.R. 68 ; Digest Supp. ; 106 L.J.K.B. 354.

Action for damages for breach of statutory duty and for negligence. The facts fully appear from the judgment.

E. G. Hemmerde, K.C., and *A. D. Pappworth* for the plaintiff.

Hartley Shawcross for the defendant.

Tucker, J. : This was an action brought by Leonard Lewis, an infant, suing by his father, the next friend George Lewis, against F. Denyé, who is the proprietor of a factory at Birkenhead, where the infant plaintiff was employed on a circular wood-cutting saw, in June, 1937. On June 29, the plaintiff met with an accident while working at the saw, and he sues by his father for damages alleged to be due to the negligence or breach of statutory duty of the defendant. I find the facts to be as follow. On the day of the accident, the infant plaintiff, who was then 16½ years of age, was working at a circular saw, at which he had previously worked, on and off, for some 17 months. He was cutting pieces of timber varying from 3 ins. to 2 ins. in depth, to be used in the construction of model boats. Before he began work, the foreman, Percival, had been working at the saw, on timber measuring 2 ins. by 2 ins. by 2½ ins. The foreman left the guard with which the saw was fitted adjusted in the proper position for the cutting of timber measuring from 3 ins. to 2 ins. in depth, so that the teeth of the saw were covered by the guard, except at the front, where the lengths of timber are inserted. At this point, the teeth of the saw are of necessity exposed for a few inches to admit the timber. There were three similar saws in regular use, at two of which boys were employed, and at the third a man. The practice was for the foreman to adjust the guard in the proper position for the sizes of timber which were to be cut by the boys, and I am satisfied that the boys were forbidden to adjust the guards themselves, and that, if they were found wrongly adjusted for the work assigned to them, it was their duty to send for the foreman to make the necessary adjustment.

The infant plaintiff was supplied with a push-stick for the purpose of pushing through the length of sized timber to be used in the construction of the boats, and also for the purpose of detaching the off-cut, or piece of timber to be discarded from the left-hand side of the saw as he stood facing it. After inserting a piece of timber, and whilst detaching the off-cut on the left, the thumb of his left hand got caught in the saw at the point of entrance, with the result that his thumb was cut off at the top joint and the fingers of his hand were lacerated, with the result that he eventually lost his little finger and the tops of his ring and middle fingers, and his index finger is now stiff, except at the knuckle joint, where there is a little movement. This accident could not have happened if he had been using the push-stick for the purpose of detaching the off-cut, and I am certain that, though he may have been using the push-stick to push through the sized timber pieces, he used his left hand near the point of entrance to detach the off-cut, a proceeding which, though highly dangerous, is none the less easy to perform if carefully done.

To what extent he had received instructions in the working of the machine was much disputed before me, and I have some doubt whether or not he ever received any detailed instructions with regard to the mechanism of the saw. I am, however, satisfied that he is a very intelligent boy, who thoroughly understood how to carry out his work, after having worked at the saw for 17 months. The mechanism for adjusting the guard was very simple, and was thoroughly understood by him, but, as he was not in fact allowed to adjust the guard, his knowledge of its mechanism is immaterial. I am satisfied that any lack of instruction on the part of those in authority at the works had no bearing on the unfortunate accident that occurred on June 29.

Such are the facts, as proved to my satisfaction. The boy's evidence was to the effect that, when he started his work on the day of the accident, the guard was adjusted so high that it was clear of the teeth at the topmost part of the saw, and that it had always been in this position whenever he had worked on it, even when he was cutting timber of a depth of only ⅜ in. He said he used the push-stick to move the off-cut to one side, and then put his left hand forward to pick up the off-cut, and in so doing caught his hand between the teeth of the saw and the guard, approximately at the top of the saw. I prefer the evidence for the defendants as to the adjustment of the guard and the position of the timber immediately after the accident, which satisfies me that the accident happened at the point of entrance, through failure to use the push-stick, and not as described by the infant plaintiff. It is common ground that the machine in question is of the most modern and approved type, and fitted with the best kind of guard known. On these facts, is the defendant liable? The Factory and Workshop Act, 1901, s. 10 (1) (*c*), provides as follows:

> All dangerous parts of the machinery . . . must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced.

Sect. 79 gives the Secretary of State power to make regulations for the safety of persons employed in dangerous trades. Regulations under this section were made on Nov. 2, 1922, and are contained in S.R. & O., 1922, No. 1196. The relevant regulations are as follows:

> 9. (*a*) Every person while being trained to work a woodworking machine shall be fully and carefully instructed as to the dangers arising in connection with such machine, and the precautions to be observed. (*b*) No person shall be employed at a woodworking machine unless sufficiently trained to work that class of machine, or unless he works under adequate supervision of a person who has a thorough knowledge of the working of the machine.
>
> 10. (*c*) The top of the saw shall be covered by a strong and easily adjustable guard with a flange at the side of the saw farthest from the fence. The guard shall be kept so adjusted that the said flange shall extend below the roots of the teeth of the saw. The guard shall extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw.
>
> 11. A suitable push-stick shall be kept available for use at the bench of every circular saw which is fed by hand, to enable the work to be carried on without unnecessary risk.
>
> 21. The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machine is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk.
>
> 22. Regs. 10, 12, 15, and 16 shall not apply to any woodworking machine in respect of which it can be shown that other safeguards are provided and maintained which render the machine equally safe as it would be if guarded in the manner described by these regulations.

Finally, in Part II of the regulations, "Duties of persons employed," reg. 23 is as follows:

> Every person employed at a woodworking machine shall (i) use and maintain, in proper adjustment, the guards provided in accordance with these regulations; (ii) use the spikes or push-sticks and holders provided in compliance with regs. 11, 14, 18 and 19, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable.

It will be observed that, on the facts as I find them, the defendant had carried out all the requirements of these regulations made under sect. 79, so far as they are relevant to the accident which occurred, but none the less the saw, by reason of the exposed teeth at the point of entrance, cannot be said to have been in the language of sect. 10:

> securely fenced, or be in such position or of such construction as to be equally safe to

every person employed or working in the factory as it would be if it were securely fenced.

It was contended for the defendant that sect. 10 should be construed in the light of the regulations, and should be given a meaning more restricted than that which the words would otherwise bear. This question
A was referred to, without being decided, in *Murray* v. *Schwachman, Ltd.* (1). In my view, the obligation imposed by sect. 10 is independent of the obligations imposed by the regulations made under sect. 79, and sect. 10 cannot be given a restricted interpretation in the light of those regulations. I therefore hold that the saw was not securely fenced, and not equally as
B safe as if securely fenced, as provided by sect. 10, and that there was accordingly a breach by the defendant of his statutory duty.

The defendant, however, contends that, even so, the infant plaintiff is not entitled to succeed, by reason of his contributory negligence or breach of statutory duty in not complying with the obligation imposed
C on him under reg. 23 (ii) of the regulations made under sect. 79, which I have already read. On the facts of this case, the failure of the infant plaintiff to use the push-stick provided was the real and effective cause of the accident, but for which it could never have happened. On the authorities, I am bound to hold that a breach by the plaintiff of a statutory
D duty causing the injury, if proved, is a defence on which the defendant can rely. It is not for me to express any view as to whether it is a desirable state of affairs that a boy of 16½, employed in work of this nature, should be disentitled to recover damages by reason of a breach by him of statutory regulations which, though posted in the
E works, he has never read, and of the existence of which he was ignorant.

On this point, I accept his evidence that he had in fact never read the regulations posted in the works. Although he did not know that he was committing a breach of a statutory regulation, he did, however,
F know the purpose for which push-sticks were provided, and he did know that it was his duty to use a push-stick to remove the off-cut. I accordingly feel bound to hold, on the facts as I find them, that the defendant must succeed, on the ground of the infant plaintiff's contributory negligence in not complying with his statutory duty under reg. 23 (ii). I
G ought perhaps to add that, had I found that the guard was adjusted in the way described by the plaintiff, and that the accident happened despite his use of the push-stick in the first instance to detach the off-cut, it would have become necessary for me to decide whether the rule prevailing in the defendant's works, whereby the boys were not allowed
H to alter the adjustment of the guard upon the saw, amounted to a failure by the defendant to provide a guard in accordance with the regulations, as was held to be the case in *Murray* v. *Schwachman, Ltd.* (1).

In view of my findings on the facts in the present case, this question does not arise for decision, and I therefore express no opinion on the point. In case of appeal, I assess the damages which I should have awarded to the plaintiff at the sum of £1,170. There will accordingly be judgment for the defendant with costs.

Judgment for the defendant, with costs.

Solicitors : *Berkson & Berkson* (for the plaintiff) ; *W. Stanley Eastburn* (for the defendant).

[*Reported by* M. D. Chorlton, *Barrister-at-Law.*]

R. *v.* TRIFFITT.

Court of Criminal Appeal (Branson, Humphreys and du Parcq, JJ.), **May 10, 1938.]**

Criminal Law—Habitual criminal—Notice of charge—Service upon prisoner—Whether proof of service must appear upon the face of the proceedings.

The accused was charged, in addition to a charge of a substantive crime, with being a habitual criminal. Upon appeal the objection was taken that no proof of the service of the notice appeared upon the transcript of the trial, although a copy of the notice, dated more than seven days before the date of the trial, was with the papers before the court. No objection was taken at the trial to the omission of the proof of service :—

Held : the omission to prove the service of the notice was not a matter which could affect the judgment of the court upon the appeal.

[**EDITORIAL NOTE.** This case reviews the procedure to be followed upon the trial of an indictment charging the prisoner with being a habitual criminal. The first part of the judgment is a very convenient restatement of the result of previous decisions, and the latter part considers and explains any inconsistency there may be between the cases of *R.* v. *Turner* (4) and *R.* v. *Foster* (5). It is now clear that proof of service of the notice upon the accused need not necessarily appear upon the face of the proceedings.

As to Procedure Against a Habitual Criminal, see HALSBURY, Hailsham Edn., Vol. 9, p. 238, para. 336 ; and for Cases, see DIGEST, Vol. 14, pp. 481-484, Nos. 5253-5290.]

Cases referred to :

(1) *R.* v. *Jennings* (1910), 4 Cr. App. Rep. 120 ; 74 J.P. 245 ; 14 Digest 484, *5283*.

(2) *R.* v. *Hunter*, [1921] 1 K.B. 555 ; 14 Digest 484, *5282* ; 90 L.J.K.B. 145 ; 125 L.T. 29 ; 15 Cr. App. Rep. 69.

(3) *R.* v. *Coney* (1923), 92 L.J.K.B. 915 ; 14 Digest 485, *5304* ; 129 L.T. 62 ; 17 Cr. App. Rep. 128.

(4) *R.* v. *Turner*, [1910] 1 K.B. 346 ; 14 Digest 482, *5258* ; 79 L.J.K.B. 176 ; 102 L.T. 367 ; 3 Cr. App. Rep. 103.

(5) *R.* v. *Foster* (1909), 3 Cr.App.Rep. 173 ; 14 Digest 482, *5257*.

Appeal against a sentence of 5 years' preventive detention on the count that he was a habitual criminal.

J. C. Phipps for the appellant.

Frank Phillips for the Crown.

Humphreys, J. [delivering the judgment of the court] : The appellant in this case was charged upon an indictment at the Essex

Quarter Sessions at Chelmsford, an indictment to which he pleaded guilty, containing a number of counts for stealing and receiving, and the indictment concluded with an averment that he was a habitual criminal. The appellant pleaded guilty to several counts in that indictment, and he was sentenced to 5 years' penal servitude. Of that sentence no complaint is made and no appeal is brought to this court. He was then tried by a jury upon the allegation that he was a habitual criminal. That was upon the day following the day upon which he had pleaded guilty to the substantive charge. The jury found that he was a habitual criminal, and he was sentenced to a further period of 5 years' preventive detention. That sentence was imposed by a different chairman and a different bench of magistrates from those who had sat and adjudicated upon the first day. He now appeals against that sentence of preventive detention, and against that finding that he was a habitual criminal, by leave of a judge, and the matter has been argued on each side before this court.

Precisely what happened was this. The chairman before whom the case came was extremely anxious that the accused man, the present appellant, should not be prejudiced, and it is only right to say that the fault in procedure, which in the opinion of this court clearly followed, was due to nothing but a desire on the part of the chairman that every possible fairness should be shown to the accused person. Accordingly, from the start of the proceedings the chairman was found asking counsel for the prosecution what course could be taken which would prevent anyone in court from knowing anything about the charge of being a habitual criminal, a charge which at that time had not been pleaded to, and which had, of course, not been tried. In the result, the chairman, with the approval of his brother justices, decided that what should be done was that the accused should be sentenced for the substantive offence, and that then he should be sent into another court, where he would come before a jury who had not been in court at the time when his case was being heard on the first day, and before a bench of magistrates who knew nothing about the matter, and that he should be tried, if he pleaded not guilty, which in fact he did, on the issue of whether or not he was a habitual criminal. Unfortunately, that procedure was in law entirely wrong. It was contrary to the language of the Act of Parliament and contrary to numerous decisions of this court. The Act in question which deals with these matters was passed in 1908, and from 1910 at least we find that there have been numerous occasions upon which the matter has been before this court as a result of the apparent dislike of those who preside at sessions in different parts of the country of following the procedure which this court has repeatedly said is the correct procedure to be followed in these cases. The first case was *R.* v. *Jennings* (1), and in the course of the argument in that case PHILLIMORE, J., as he then was, observed, at p. 121:

> As the law is at present, when a prisoner is found guilty of the first charge [that

is the substantive charge]—the charge as to being a habitual criminal must be tried at the same sessions, and cannot be postponed. You cannot split an indictment.

That is the ground of the decision. He added that he had written to the Home Secretary as to the desirability of a change in the practice so as to enable a postponement to be made in a proper case. That was dealing with a class of case where a man might desire to call witnesses who would A be material on the question of his being a habitual criminal and who might not be present. In fact no change has taken place in the law at all. The headnote of that case, which is borne out by the judgment, is this :

B

> An indictment for being a habitual criminal under the Prevention of Crime Act, 1908, must be tried immediately after the primary charge.

That case has been considered on numerous occasions, and one of the occasions was in 1920, when this court had to deal with *R.* v. *Hunter* (2). In that case the appellant had been tried by a jury and found guilty of C office-breaking and larceny, and the indictment contained an allegation that he was a habitual criminal. The deputy chairman who presided in that case, in the interests, as he believed, of fairness and justice, postponed the trial on the question of being a habitual criminal until the next sessions, and in the meantime he sentenced the accused man to 3 years' D penal servitude. At the next sessions, the accused was tried and found guilty of being a habitual criminal, and he then appealed to this court, when the sentence of preventive detention was quashed, the court holding, following *R.* v. *Jennings* (1), that the procedure required to be followed under the Act of 1908 was that the question of whether the E accused person was a habitual criminal must be tried by the same jury who had tried him upon the substantive charge, and must also be tried immediately after that finding.

In the present case, no jury convicted the appellant, because he pleaded guilty to the substantive charge, but, as has been stated, the justices F who had to deal with the question of sentence were two separate sets of justices, the first set hearing all that was known about the man, and all that could be said for and against him, and sentencing him to 5 years' penal servitude, and another set of justices, on another day in another court, dealing with the question of what additional sentence, if any, G should be passed upon him on the charge of being a habitual criminal, and deciding that there should be added to that sentence a sentence of 5 years' preventive detention. In our view, that matter has been disposed of and that procedure has also been declared by this court in such plain terms to be wrong that it is unnecessary in the present case to say H any more about the matter. In *R.* v. *Coney* (3), the appellant was a person who had been committed to the West Riding Sessions and had pleaded guilty to a charge of housebreaking. Counsel for the prosecution then announced that there was, as no doubt the court was aware, a charge in the indictment against the accused that he was a habitual criminal, but counsel said that he could not proceed with that charge unless the chairman first sentenced the appellant to 3 years' penal servitude and not less. In that quite erroneous belief that it was necessary for a sentence of penal servitude to be passed before the accused could even be tried upon the charge of being a habitual A criminal, that procedure was adopted. Having been sentenced to penal servitude, he was then called upon to plead to the charge of being a habitual criminal, and he pleaded guilty. Therefore, it was a case in which it was quite clear that no injustice had been done to him. The same result would have followed precisely if the proper procedure had B been followed. Nevertheless, the court held—the court being presided over by LORD HEWART, L.C.J., and the other members of the court being BRANSON and ROCHE, JJ.—that, on the facts of that case, the sentence of preventive detention must be quashed. LORD HEWART, L.C.J., in giving his judgment observed that the procedure which was C followed was not such as the court approved, and was a procedure which ought not to be followed in future cases. He then gave the reasons for his judgment, and added that, in the opinion of the court, the sentence on the substantive charge ought not to be passed, and that it was wrong to pass it, upon a man who was awaiting his trial on a charge of being a D habitual criminal. The proper procedure was—and once more this court repeated the proper procedure—for the trial upon the charge of being a habitual criminal to follow immediately upon the plea of guilty to, or the conviction upon, the substantive offence.

That would be sufficient to dispose of this case, but for one other point E which was taken by Mr. Phipps, who appeared for the accused, the appellant. He mentioned that it appeared from the transcript of the trial of this appellant on the charge of being a habitual criminal that no proof was given of the service of the notice, required to be given to the clerk of the court seven days before the trial, that an indictment will be F preferred at the instance of the Director of Public Prosecutions containing an allegation that the accused is a habitual criminal. That is one of the notices, and one of the steps, required to be taken by the terms of the Act itself, and is a condition precedent to any person being tried upon such a charge. In this case, it may be mentioned as a fact that the proper G notice was given. That is clear to us from the fact that the notice is with the papers which were before the court. It bears the date on which it was received by the clerk of the peace for the county of Essex, a date which is more than seven days before the date of the trial. Therefore, quite clearly no injustice was done to anybody.

H Mr. Phipps has drawn our attention to *R.* v. *Turner* (4), a very long report of a case in which the court answered a large number of questions as to the proper procedure to be followed in these cases of charges of being a habitual criminal. One of the questions was: "Was it necessary that the clerk of the peace should be called and sworn to produce the original notice sent to him by the Public Prosecutor?" In answer to that question, CHANNELL, J., who gave the judgment of the court, said, at p. 358 :

> . . . it was not necessary that the clerk of the peace himself should be called, but there must be some proof of the receipt of the notice. The proof may be given by calling an officer of the clerk of the peace, e.g., his clerk, or some person from his office, or by calling the person who served the notice. Service of the notice is a matter to be proved by evidence, it is a fact to be proved by evidence on oath. A
> The notice cannot be treated as one of the records of the court which could be looked at without proof, as it is a notice to the court rather than a record of the court itself, and it must therefore be proved.

He then went on to say that, in his opinion, the notice could not be treated as part of the records of the court, and therefore a document which would prove itself. He observed that, in his opinion, the date of B
the receipt could not be taken from the document, and it is the date of the receipt which is the important point. Therefore, that is the decision of this court, to the effect that such a notice ought to be proved, and proved upon oath, either by someone who had served it or by someone who had received it, or who could prove its receipt on the part of the C
clerk of the peace, not necessarily the clerk of the peace himself. Whether that ought to affect the judgment of this court, however, is a matter which was considered in a later case, *R.* v. *Foster* (5). In that case the court, upon that same point being taken, and finding that no such point had been taken at the trial, and that there had been no objection at the trial D
that the notice had not been served, and the point not being one which was taken in the notice of appeal, declined to pay any attention to it at all. This court will follow the decision in *R.* v. *Foster* (5), and, so far as that point is concerned, the court will give no effect to it.

We have then to consider whether, as a result of the irregularity E
—the entire irregularity of the procedure in this case—we ought to quash the finding of being a habitual criminal and the sentence which follows upon that finding, or whether the court ought to take the view that it was a mere irregularity in the procedure. We have considered the course which has been followed by this court on previous occasions, where, F
apparently, quite irrespective of the question of whether any injustice has been done to a particular accused person, so that it could be said there was a hardship as far as he was concerned, the court has taken the view that such irregularity of procedure is a question of law, and, where the law has not been obeyed in a criminal trial, the court has taken the G
extreme step of quashing the finding and quashing the sentence. We feel that that is the course which we ought to take in this case. Accordingly, although there are no merits whatever in this appeal, for the reasons which I have stated the appeal is allowed, and the finding that the appellant is a habitual criminal will accordingly be quashed. It follows also H
that the sentence of 5 years' preventive detention will be quashed. There remains the sentence of 5 years' penal servitude, which was passed upon him with respect to the substantive offence and which he will have to serve. The court is not sufficiently acquainted with the prison rules to be quite sure whether this man has been treated as an appellant or

not, but we take the view that, if he has lost any time at all as a result of this appeal, that time ought to be made up to him, and ought to count as part of his sentence.

Solicitors: *Jones & Son,* Colchester (for the Crown); *Registrar of the Court of Criminal Appeal* (for the appellant). A

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Re A DEBTOR (NO. 21 OF 1937), THE DEBTOR *v.* THE PETITIONING CREDITOR AND THE OFFICIAL RECEIVER.

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), **May 20, 23, 1938.]**

Bankruptcy—Petitioning creditor's debt—Judgment debt—Part of debt unenforceable in bankruptcy—Debt of married woman incurred before Aug. 2, 1935*—Bankruptcy notice for whole debt—Validity of notice—Law Reform* (*Married Women and Tortfeasors*) *Act,* 1935 (*c.* 30), *s.* 4 (1) (*c*).

The debtor incurred a debt of £77 5*s.* to the petitioning creditor, of which £5 5*s.* was incurred before Aug. 2, 1935, the date of the coming into operation of the Law Reform (Married Women and Tortfeasors) Act, 1935. £4 was paid in respect of the debt, and the petitioning creditor then sued for the balance and obtained a judgment for £78 18*s.* 6*d.*, debt and costs, which was drawn up in the form applicable to a contract entered into after Aug. 2, 1935. The petitioning creditor then obtained the issue of a bankruptcy notice in respect of the whole amount of the judgment. That notice was not complied with and a petition was duly presented :—

Held : (i) the issue of the bankruptcy notice was a step in the enforcement of the judgment in bankruptcy, and, the judgment being one which, by virtue of the inclusion in it of a debt incurred before Aug. 2, 1935, could not be enforced in bankruptcy, the bankruptcy notice was a nullity *ab initio* and no petition could be founded upon it.

(ii) where a judgment in the county court is in respect of a contract entered into or an obligation incurred before Aug. 2, 1935, C.C.R., Ord. 24 r.3 (*a*) does not require the judgment itself to contain a note of that fact, but that a note thereof should be made in the minute of the judgment entered in the county court book under C.C.R., Ord. 24, r.1.

Decision of Luxmoore *and* Morton, JJ., *sitting as the Divisional Court in Bankruptcy* ([1938] 2 All E.R. 356) *reversed.*

[EDITORIAL NOTE. The Divisional Court held that the part of the debt enforceable in bankruptcy being over £50, the bankruptcy notice was one upon which a petition might be founded ; but the Court of Appeal, reversing this decision, have held that a bankruptcy notice is an enforcement in bankruptcy of the debt and that a bankruptcy notice, which is bad as a whole, cannot be made good by cutting away part of the judgment upon which it is based. The judgment, in other words, is indivisible, and, if any part of it is unenforceable in bankruptcy, then the whole is unenforceable, and no bankruptcy notice can be issued in respect of it.

As to Amount for which Bankruptcy Notice may be issued, see HALSBURY, Hailsham Edn., Vol. 2, pp. 39, 40, para. 50 ; and for Cases, see DIGEST, Vol. 4, pp. 93, 94, Nos. 840-851.]

Case referred to :

(1) *Re A Bankruptcy Notice,* [1907] 1 K.B. 478 ; 4 Digest 91, *823* ; 76 L.J.K.B. 171 ; *sub nom. Re A Debtor,* 96 L.T. 131.

Appeal from a decision of a divisional court of the Chancery Division (reported [1938] 2 All E.R. 356) which reversed the decision of the county court registrar and made a receiving order against the debtor.

W. N. Stable, K.C., and *G. F. Kingham* for the appellant.

V. R. Aronson for the respondent.

Sir Wilfrid Greene, M.R. : The debtor is a married woman, who had various transactions with the petitioning creditor. One of the purchases which she made from him was made before Aug. 2, 1935, the date when the Law Reform (Married Women and Tortfeasors) Act, 1935, received the Royal assent. That was a small purchase of a fur coat for a sum of £5 5*s*. After the passing of the Act, she made other purchases, bringing her total purchases up to £77 5*s*. As against that, she had made two payments on account, one of £1 on Nov. 16, 1935, and one of £3 on Mar. 28, 1936, leaving a sum of £73 5*s*. owing. In Jan., 1937, proceedings were taken against her in the county court, and judgment was recovered for £73 5*s*., and £5 13*s*. 6*d*. costs. Embedded in that judgment was a sum in respect of the purchase made before the Act of 1935 came into force. Whether the whole £5 5*s*. should be treated as being included in that sum, or whether the payments on account had been, or ought to be, treated as having been appropriated towards the payment of that sum of £5 5*s*., does not very much matter, because in any event there would be a sum left referable to that particular transaction.

The petitioning creditor, not having received payment, applied for, and obtained, the issue of a bankruptcy notice, which is dated Oct. 14, 1937. It is in the usual form, and requires payment of the sum of £78 18*s*. 6*d*., with the ordinary alternatives. That notice was not complied with, and a petition based upon it was duly presented. The registrar, however, refused to make an order, upon the ground that he was prevented from doing so by sect. 4 (1) (*c*) of the Act of 1935. That Act made married women liable as though they were *femes soles* in respect of various matters of contract, tort, and so forth. Also sect. 1 (*d*) provided that they should be "subject to the law relating to bankruptcy and to the enforcement of judgments and orders." Sect. 2 got rid of the separate property of married women. Accordingly, as from the passing of the Act, the property of a married woman belongs to her as though she were a *feme sole*. Then there are certain provisions saving the validity and effect of antecedent restraints on anticipation.

Then sect. 4 (1) provides, among other things, as follows:

> Nothing in this part of this Act shall . . . (*c*) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property.

It is said on behalf of the appellant that, inasmuch as part of the judgment in this case is referable to a debt incurred before the passing of the Act, the effect of the provision which I have read is to prohibit the enforcement in bankruptcy of the judgment. It is said in support of that proposition that the judgment is not divisible, and the mere presence in it of some part which is referable to a debt incurred before the Act is sufficient to make the whole unenforceable. If the other arguments of the appellant be right, it was not disputed that that was a correct proposition. We can, therefore, disregard the circumstance that the major part of this judgment was in respect of debts incurred after the passing of the Act, and we can treat it in exactly the same way as a judgment would fall to be treated if it were based entirely on debts incurred before the passing of the Act.

The judgment in the county court is before us. It is in a form set out in the County Court Rules. The form of it, subject to a reference to a possible restraint on anticipation, is nothing more nor less than A the ordinary form of judgment. It contains upon its face no reference to the fact that part of the judgment is referable to a debt incurred before the passing of the Act of 1935.

That leads me to mention in passing one observation in the judgment of the divisional court with which I respectfully disagree. It was thought B by the judges there that the order was in a wrong form, inasmuch as it contained no reference to that circumstance. In support of that view, the judges referred to C.C.R., Ord. 24, r. 3 (*a*), which provides:

> A judgment or order against a married woman shall be in such one of the forms in the appendix as would be applicable if she were a *feme sole*, unless the court C otherwise directs: provided that (*a*) where the judgment or order is in respect of a contract entered into or a debt or obligation incurred before Aug. 2, 1935, the minute of the judgment or order shall contain a note showing that the contract was entered into or the debt or obligation incurred before that date and that the judgment or order is not enforceable otherwise than against the property of the married woman.

The judges in the divisional court, I think, did not notice that that D direction is not a direction for the insertion of a paragraph referring to those matters in the order itself; but a direction that a note shall be made in the minute of judgment. The minute of judgment, of course, is not the judgment itself, but the minute which the registrar enters in the county court book under C.C.R., Ord. 24, r. 1. The object of the E direction is not to insert in the order itself any reference to those matters, but obviously that it may serve as an aid to memory, and perhaps to ensure that, when the certificate of judgment, which is taken from the entry in the book, is applied for, for the purpose of taking some step to enforce the judgment, the registrar shall have before him the entry, F which it is provided shall bear on its face a warning with regard to those matters affecting the enforceability of the judgment.

In the present case, as I have said, there is nothing in the order dealing with those matters. Indeed, there was no need for there to be anything of that kind. The actual certificate did, in point of fact, have this upon G it. It described the order, which was an order for payment by instalments of £10 "Ordered first payment Mar. 31, 1937: separate estate judgment." What precisely was intended to be referred to by that I am not quite sure, but it rather looks as though, when the note was made in the county court book, it was intended to call attention to the H fact that part of this judgment related to a debt incurred before the Act of 1935. However that may be, nothing, in my opinion, really turns on the form of the certificate or the entry in the book, because this is a question of statutory prohibition against the enforcement in bankruptcy of certain types of judgment. There is no necessity to make any reference to those matters in the judgment itself, because it is not the judgment that prevents the enforcement, but the express terms of the Act of 1935 itself.

The divisional court dealt with the matter, if I appreciate their judgment correctly, in this way. They took the view that the debt owing A to the petitioning creditor was a good petitioning creditor's debt, because there was included in the sum payable under the judgment a sum of more than £50 incurred since the passing of the Act of 1935. Regarding that as a good petitioning creditor's debt, they felt themselves able to disregard the circumstance that the order also included something which B would not be a good petitioning creditor's debt and could not be taken into account in considering whether there was a good petitioning creditor's debt. Whether or not they thought that that analysis had the effect of making the bankruptcy notice valid I am not quite clear. It is common to find cases where, a bankruptcy notice having been issued in C proper form following the language of the judgment, when the petition is presented, the court will scrutinise the debt on which the judgment was based, and it may go behind the judgment, in the sense that it may find that that debt is one which, in whole or in part, would not be a good debt for the purposes of bankruptcy proceedings. A simple case of that D kind is the case of debts owing to moneylenders. The court in those cases, on the hearing of the petition, is prepared, so to speak, to scale down the petitioning creditor's debt. If the effect of scaling it down is to bring it below £50, there is no good petitioning creditor's debt at all. If, however, after the objectionable part has been cut away from E the judgment debt, there is an amount of £50 or more left, then it is a good petitioning creditor's debt.

Those cases, however, all proceed on the footing that the bankruptcy notice, in those instances where the petition is based on a bankruptcy notice, was a good notice, and had nothing to do with the question of F whether the bankruptcy notice itself was a good notice. It appears to me that the principles on which the court acts when it scrutinises a debt which is the basis of a petition in bankruptcy are not applicable to the case of a bankruptcy notice. In other words, if the bankruptcy notice is bad, one cannot make it good by cutting away, so to speak, some G objectionable part from the amount of the judgment on which it is based. The effect of saying that those principles did apply would, as it seems to me, be that the court would then be saying that a bankruptcy notice, mentioning the reduced sum, would have been a good bankruptcy notice. Logically, in fact that must follow. That would H be impossible in reality, because, if an amount mentioned in the judgment were scaled down by cutting away some objectionable part of it, the bankruptcy notice would be a bad bankruptcy notice, since it would not follow the terms of the judgment. Therefore, it seems to me that the principles of those cases have no bearing on the matter of the validity of a bankruptcy notice. I am not quite clear whether the judges in the divisional court intended to apply those principles or not, or whether they were treating the bankruptcy notice as a good bankruptcy notice, and considering whether or not, in accordance with the principles of those cases, they could scale the debt down, with a view to seeing whether there was a good residuum left, sufficient to found a petition.

The real point in the case in my judgment, is whether or not the bankruptcy notice was a good notice. If it were something issued in the face of a statutory prohibition, it would be a bad notice, and it would not be possible, therefore, to found a bankruptcy petition upon it. The matter comes down to a very short point, as indeed Mr. Aronson in his careful argument agreed, on the construction of sect. 4 (1) (*c*) of the Act of 1935. If the issue of the bankruptcy notice is an enforcement in bankruptcy of the judgment debt, then admittedly the bankruptcy notice was bad. Mr. Aronson contended, however, that the mere issue of the bankruptcy notice is not a contravention of the provisions of sect. 4 (*c*), which says that the judgment is not to be enforced in bankruptcy, because he says that the issue of the notice is not an enforcement in bankruptcy, but merely a step to put the creditor in a position where he can proceed to enforce the judgment by presenting a bankruptcy petition. In my opinion, that construction of the paragraph is much too narrow. A bankruptcy notice is something quite different from a letter of demand, or something of that kind. It is a proceeding provided for in the Bankruptcy Act and in the rules thereunder. It is a step, and in some cases a necessary step, in the enforcement in bankruptcy of a judgment, and non-compliance is an act of bankruptcy. The bankruptcy notice is issued by the court. Application must be made for the notice to be issued, and, in the event of refusal by the registrar to issue a notice, there is a right to appeal to the court. It seems to me that the creditor, when he applies for his bankruptcy notice (and, in case of necessity, appeals to the court against a refusal to issue it), is enforcing in bankruptcy a judgment on which the notice is intended to be based. It is the first step in the enforcement in bankruptcy of the judgment. The application for, and the issue of, the bankruptcy notice are both, to my mind, quite clearly proceedings in bankruptcy. The bankruptcy rules contain provisions with regard to them, and it is not without significance that Part 3 of those rules is headed " Proceedings in bankruptcy " ; and the second *fasciculus* of rules under that part is headed " Bankruptcy notice." I should have thought that, if the question were asked whether the application for the issue of a bankruptcy notice and the issue of the bankruptcy notice is or is not an enforcing in bankruptcy of the judgment, there could be only one answer to that question.

It is, perhaps, useful to place side by side the provisions of sect. 4 (1) (*c*), and the provisions of sect. 1 (*d*), as was suggested by Scott, L.J., in the course of the argument. Sect. 1 (*d*) is the provision which makes married women " subject to the law relating to bankruptcy and to the enforcement of judgments and orders." The pendant to that is sect. 4 (1) (*c*), which protects the married woman with regard to certain contracts. It seems to me that, under sect. 1 (*d*), the married woman is made liable to have a bankruptcy notice served upon her, and liable to have put into operation against her the bankruptcy machinery by the creditor taking A the first step of issuing that notice. It is sect. 1 (*d*) which exposes married women in general to that liability. It is sect. 4 (1) (*c*) which, in respect of certain contracts, saves them from that liability.

There is only one other matter to which I should refer. There is an authority in which there is a *dictum* of FLETCHER MOULTON, L.J., which B might be thought to have some bearing on the present question. It is *Re A Bankruptcy Notice* (1), a case where an award had been obtained in an arbitration, and an order had been made by the master, on an application to enforce that award, directing that judgment be entered in accordance with the award. That was something which at that time C could not properly be done. Application having been made for the issue of a bankruptcy notice based upon that order, the application was refused by the registrar, and the creditor appealed. The ground of the decision of this court was that the order was a bad order, because it did not comply with the Arbitration Act, 1889, s. 12, but, on the contrary, D contained a provision that judgment ought to be entered, which was not permissible under that section.

However, FLETCHER MOULTON, L.J., used certain language which I must mention. Before doing so, I may point out that the language of the Arbitration Act, 1889, s. 12, was:

> E An award on a submission may by leave of the court or a judge be enforced in the same manner as a judgment or order to the same effect.

FLETCHER MOULTON, L.J., said, at p. 482:

> The only other question is as to whether the procedure under the Bankruptcy Act, 1883, s. 4 (1) (*g*), is an enforcement within the meaning of the Arbitration Act, F 1889, s. 12. In my judgment an application for a bankruptcy notice is not a method of enforcing a judgment. It is the commencement of proceedings of far wider effect, and is not intended to be included in the words of sect. 12 of the Arbitration Act. Therefore, this order, even if we corrected it by striking out the words inserted without jurisdiction, would not entitle the creditor to the issue of a bankruptcy notice.

G There is one sentence in that paragraph which I have read which, taken out of its context, might appear to support the argument of the respondent in this appeal, but, in my opinion, it really does not help that argument, because the passage, when properly construed in its context, is merely an expression of the view of FLETCHER MOULTON, L.J., on the meaning H of the word " enforced " in the Arbitration Act, 1889, s. 12. In that context, he attributes to the word a rather more limited meaning. What we have to decide, however, is the meaning of the words " to be enforced in bankruptcy " in this particular Act and in the context in which we find them. In my opinion, the answer to that question is that the issue of a bankruptcy notice is a step in the enforcement of the judgment in bankruptcy. As the judgment is one which, by virtue of the element in it to which I have referred, cannot be enforced in bankruptcy, the bankruptcy notice founded upon it was bad, and was a nullity *ab initio*. The result is that no act of bankruptcy was ever committed by non-compliance with the notice, and that the foundation of the petition is destroyed. The appeal must be allowed with costs. A

Scott, L.J.: I agree.

Clauson, L.J.: I agree.

Solicitors: *Rising & Ravenscroft*, agents for *Triggs Turner & Co.*, Guildford (for the appellant); *W. A. G. Davidson & Co.* (for the respondents). B

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law*.]